IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,

Appellants,

against

F. O. MORGAN, doing business as F. O. MORGAN SHEEP COMMISSION COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES IN OPPOSITION TO APPLICATION OF APPELLANTS FOR A STAY AND SUPERSEDEAS PENDING APPEAL

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THE CASE BELOW

The case below is unreported and the opinion upon the order appealed from, which was made and entered June 18, 1938, appears at R. 248. The court below denied without opinion an application for a stay and supersedeas of the "enforcement, operation and execution" of the order appealed from. This order has been omitted in printing the record (Index, p. ii). Application for such stay and supersedeas was thereafter made to Associate Justice Pierce Butler and was referred by him to the Court.

JURISDICTION OF THE COURT

The jurisdiction of this Court is attempted to be invoked in accordance with the following statement made in the jurisdictional statement under Rule 12 filed by appellants:

> "Section 316 of the Packers and Stockyards Act (7 U. S. C., Section 217) provides:
>
> > "For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive of this chapter, and to any person subject to the provisions of sections 201 to 217 inclusive of this chapter. (Aug. 15, 1921, c. 64, Sec. 316, 42 Stat. 168.)
>
> "The applicable provisions of the laws relating to suits brought to suspend or restrain the enforcement of orders of the Interstate Commerce Commission and to appeals from orders or decrees made in such suits are found in Title 28, U. S. Code, Sections 44, 47, and 47a (Act of Oct. 22, 1913, c. 32, 38 Stat. 220). Section 47 provides for a hearing by a three-judge court upon an application for an interlocutory injunction to sustain or restrain the enforcement of orders of the Interstate Commerce Commission; and further provides:
>
> > "* * * and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same re-

quirement as to judges and the same procedure as to expedition and appeal shall apply.

"Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a, and 48. Section 47a provides in part as follows:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

"Section 238 of the Judicial Code as amended (28 U. S. C., Sec. 345, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, 938) provides that the Supreme Court has direct appellate jurisdiction to review the final decree of a district court made pursuant to Section 316 of the Packers and Stockyards Act of 1921 (7 U. S. C. Section 217)."

This jurisdictional statement also says:

"The cases believed to sustain the jurisdiction of the Supreme Court of the United States are *B. & O. RR. Co.* v. *United States et al.*, 279 U. S. 781; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; and *Morgan et al.* v. *United States et al.*, 297 U. S. 468, No. 581 October Term 1937, decided April 25, 1938, No. 581 October Term 1937, decided May 31, 1938, 58 Sup. Ct. 773, 82 L. ed. 1031."

Neither the statutory provisions cited nor the decided cases referred to give any support to the claim of appellants that their appeal is from a "final judgment or decree" or that this Court for any other reason has jurisdiction of their appeal (see Argument, pp. 8 *et seq.*, *post*).

STATEMENT

This brief is in opposition to an application for a stay pending the decision of this Court upon an appeal from an order of a specially-constituted District Court for the Western District of Missouri, made and entered June 18, 1938, which carried out the mandate of this Court (R. 182-4) filed June 6, 1938, by ordering the release to appellees of certain impounded funds, after reversing, in accordance with said mandate, a decree made and entered by said District Court on July 9, 1937, which refused to hold invalid or to permanently enjoin an order of the Secretary of Agriculture, dated June 14, 1933, fixing the commission rates chargeable by appellees.

Appellees oppose the stay upon the grounds: (1) that the order is not appealable, because it is not a "final judgment or decree" or otherwise appealable, and that hence this Court has no jurisdiction; (2) that even if appealable, the order was made in the exercise of discretion, and appellants have not specified any abuse thereof; and (3) that the points raised upon the appeal are unsubstantial and the appeal is frivolous.

On July 27, 1923,[1] after arbitration proceedings, the then Secretary of Agriculture prescribed commission rates

[1]See R. 230. In our Statement opposing Jurisdiction and Motion to Dismiss or Affirm, this date was erroneously given as January 1, 1926.

to be charged by appellees, who are market agencies at the Kansas City Stockyards, in the buying and selling of livestock as agents for the consignors thereof (R. 212-230). These rates (hereinafter sometimes referred to as Tariff No. 1) continued in effect until May 11, 1932, when appellees filed with the Secretary, pursuant to Section 306 of the Packers and Stockyards Act of 1921, a new schedule of rates (hereinafter sometimes called Tariff No. 2). This schedule fixed rates below the maximums approved by the Secretary on July 27, 1923. Appellants have conceded that the new rates involved a 10% cut. (Answer to Petition to Set Aside, R. 133.)

In the Fall of 1930, the Secretary of Agriculture commenced procedings to investigate the reasonableness of the rates authorized in Tariff No. 1. This investigation, which was based upon the test year 1929, concluded with an order dated May 18, 1932. This, however, was promptly set aside by the Secretary by reason of changed conditions and a rehearing ordered, which was based upon the test year 1931, and eventuated in the invalid order of the Secretary of June 14, 1933, heretofore referred to (R. 21-24).

Before the effective date of the Secretary's order, appellees filed with the statutory court for the Western District of Missouri a petition to set aside, and a few days later, on July 22, 1933, obtained a temporary restraining order (R. 129-130) conditioned upon their depositing in court the difference between what they would continue to collect under their filed rates (Tariff No. 2) and the rates fixed in the Secretary's order of June 14, 1933, now invalidated, which were considerably lower (hereinafter sometimes called Tariff No. 3).

By the express terms of this temporary restraining order it appears that these deposits were to be made to secure repayment of overcharges by the market agencies to the consignors of livestock, in the event the Secretary's order should eventually be held to be valid by the court, and that the temporary restraining order against the Secretary's reduced rates going into force was made to protect the market agencies against inability to collect from the consignors the difference between the filed rates and the Secretary's rates, in the event the Secretary's order should be declared invalid. It was provided that the deposits in court should continue to be made "pending final disposition of this cause" (R. 130).

This is the third time that this Court has been appealed to in this matter. On the first appeal it reversed and remanded because the District Court had improperly stricken from the petition to set aside, filed by the market agencies, allegations concerning the denial of a "full, fair and open" hearing. (*Morgan* v. *U. S.*, 298 U. S. 468.) On the second appeal, after this issue had been tried, it again reversed and remanded for proceedings in conformity with its opinion on the ground that the Secretary had denied the market agencies a "full, fair and open" hearing. (*Morgan* v. *U. S.*, No. 581, October Term, 1937, 303 U. S. — —, 58 Sup. Ct. 773; petition for rehearing denied on *per curiam* opinion, May 31, 1938, 303 U. S. —, 58 Sup. Ct. 999.) It termed the hearing before the Secretary "fatally defective" and the order invalid. The reasons for so holding were that the Secretary had never fairly apprised the market agencies of the specific issues in the case or of his claims and contentions with respect to what the evidence showed, and without so doing had approved find-

ngs of fact and an order prepared by subordinates, including the active prosecutors for the Department of Agriculture, after private conferences with them and without notice to the market agencies of what the findings contained or opportunity to argue with respect thereto. The Government petitioned for a rehearing which was denied upon a *per curiam* opinion in which the Court said: "From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below."

Upon receiving the mandate of this Court the statutory court entered its decree adjudging the Secretary's order of June 14, 1933, to be void and invalid and permanently enjoining him from enforcing it (R. 203-4). The Government, however, moved (R. 184) for a stay of the distribution of the funds impounded in the Court, amounting to some $600,000, pending further proceedings which they asserted the Secretary planned to take to "validate" his order, *as of June 14, 1933* (R. 185). This motion was denied (R. 250). The order denying it is not appealed from. Appellees moved for an order permitting them to withdraw the impounded funds from the registry of the Court. This motion was granted, and it is from the order granting it that the Government appeals (R. 200-2, 208). In its opinion granting the motion, the statutory Court expressed the opinion that the Government's contentions "had not the faintest shadow of merit", that it would be an act of bad faith in view of the understanding pursuant to which the funds were deposited and the terms of the temporary restraining order for the Court to refuse to return the impounded funds to appellees, and that the Secretary's pro-

posal to make a *nunc pro tunc* order[2] as of June 14, 1933, by "validating" his invalid order of that date, was contrary to the statute and devoid of any "shred of reason or law to support it" (R. 248-250).

The Government then applied to the statutory court for a stay and supersedeas, pending decision upon this appeal, against the "enforcement, operation and execution" of the order appealed from. The statutory court denied the stay. Application was then made to Mr. Justice Butler of this Court who referred the matter to the Court.

ARGUMENT

I.

No appeal lies to this Court from the order of the court below releasing the funds impounded pursuant to the temporary restraining order.

1. The order is not appealable because under the statute no appeal now lies or ever did lie from the granting of the temporary restraining order, much less from a mere incident of its granting or dissolution.

Pursuant to the mandate of this Court to proceed in conformity with its opinion (R. 182), the statutory Court entered its final judgment and decree holding the order, made June 14, 1933 by the Secretary of Agriculture, to be void and invalid and permanently enjoining its enforcement (R. 203). The Government is not appealing from this

[2]On page 17 of the Government's brief in opposition to our Motion to Dismiss or Affirm, this objective is admitted.

al judgment and decree which this Court has explicitly dered to be made.

Nor does the Government appeal from the refusal of statutory Court to grant its motion to stay the distribun of the impounded funds (R. 184-5, 250) pending acn which it represents that the Secretary of Agriculture oposes to take in order to "validate" his invalid order of ne 14, 1933, as of that date. It appeals only from an der made by the statutory Court as the necessary conquence of its refusal to stay the distribution of the imunded funds, to wit, an order directing their release to pellees. If it had appealed from the refusal of the stay der, the Government could not possibly have argued t it was absolved from the necessity of showing an abuse discretion, which it would have been utterly unable to ow. But it claims upon this appeal, nevertheless, that the der directing the distribution of the impounded funds, ich was the necessary consequence of the refusal to grant tay, was not mandatory upon the Court nor even discrenary with it, *but that it was mandatory for the Court refuse to order the distribution pending the proposed ion of the Secretary.* Or to put it another way, the pellants had an absolute right that pending action by the cretary the impounded funds should not be distributed. is inevitably follows because no attempt is made to claim y abuse of discretion. Indeed appellants admit in their ef in opposition to our motion to dismiss or affirm (pp. 13) that they do not claim abuse of discretion but assert t as a matter of law the District Court had no right to use the stay or order the distribution.

Under the applicable sections of the United States Code itle 28, Sections 47 and 47-a) appeals lie to this Court

(1) from the granting or denying of an interlocutory injunction, and (2) from "A final judgment or decree" of the District Court in the cases specified in Section 44. By virtue of Section 47, the statutory Court is authorized upon a specific finding that "irreparable damage would otherwise ensue to the petitioner", to allow a temporary stay or suspension of the operation of an order of the Secretary of Agriculture, pending the application for an interlocutory injunction and hearing and decision thereon. In this case such a temporary stay or suspension was ordered on July 22, 1933, a few days after the filing of the petition to set aside, and immediately before the Secretary's order would have become effective (R. 129). No appeal is allowed by the statute from the granting or denying of such a temporary stay or suspension, and none was attempted to be taken. By further orders of the Court this temporary stay or restraining order was extended pending decision of the statutory Court upon the application for temporary and permanent injunctions and thereafter pending the appeals to this Court (R. 130, 181). The Court denied both types of injunction at the same time (R. 170-1). The last extension was on consent of the Government (R. 182).

The statutory Court could, of course, under the statute, have granted this temporary restraining order without requiring any impounding. As previously stated, the appellees had, on May 11, 1932, filed with the Secretary of Agriculture a schedule of rates and charges, known as Tariff No. 2, and these rates and charges were being collected by them pursuant to law (Sec. 306) at the time the statutory Court granted to them a temporary restraining order against the rates set by the Secretary in his order of June 14, 1933. These rates of the Secretary's being tempo-

rily enjoined by the statutory Court, appellees were, of urse, legally entitled, and indeed required, to continue to arge their filed rates which were higher than those fixed the Secretary. Instead, however, of granting to appel- es a temporary restraining order against the Secretary's tes without the impounding condition, the statutory Court ade it a condition of the granting of the order that appel- es impound with the Court the amounts collected by them, rsuant to their filed rates, in excess of what would have en collected by them under the Secretary's rates which ere enjoined. The hearing before the Secretary having en held by this Court to have been "fatally defective" d his order of June 14, 1933 attempting to fix rates hav- g been held "invalid", and the statutory Court having tered its final judgment and decree pursuant to the man- te of this Court, it is now contended that the statutory urt had no power, even in its discretion, to order the re- rn to appellees of the impounded funds deposited pursu- t to its temporary restraining order, and that its order leasing them is appealable to this Court as "a final judg- ent or decree" of the District Court.

This claim amounts to an assertion that although the atutory Court was not required to order the impounding the first place as a condition of granting the temporary straining order, and could have terminated the impound- g at any time by an order which clearly would have been terlocutory and non-appealable, and that although no ap- al lies from the granting of the temporary restraining der, or any of its incidents, and none was taken, neverthe- s this restoration of the *status quo* by the Court, now t the temporary restraining order has terminated by itation, is something that this Court may review as a

"final judgment or decree" of the District Court, simply because it is the last act done by the Court.

It is the contention of appellees, which will be later argued, that the terms of the temporary restraining order being entirely unambiguous, it was required that, upon the Secretary's order being set aside as invalid, the impounded funds be immediately returned to those who had always owned them and who had merely deposited them as security for claims no longer possible of establishment. It is clear, however, that no appeal lies for an entirely different reason going to the very heart of appellants' contentions. Their theory is (and we assume its validity for the sake of the argument, despite its absurdity) that the "cause" is not yet terminated because the Secretary is entitled to an opportunity to "validate" his order of June 14, 1933, by now affording a "full, fair and open" hearing to appellees, after which he will make a *nunc pro tunc* order as of June 14, 1933. The statutory Court can then, it is argued, be required to distribute the impounded funds in accordance with the order of the Secretary now "validated". This argument plainly defeats the principal claim of appellants that this Court has jurisdiction of the appeal because it is from "a final judgment or decree" of the District Court. On this theory, even the decree entered by the statutory Court pursuant to the mandate of this Court, adjudging the Secretary's order invalid and permanently restraining him from enforcing it, is an interlocutory decree, because further proceedings must be permitted to the end that the Secretary's order may be "validated" and enforced in the "cause" then pending in Court. *A fortiori*, the order releasing the impounded funds is interlocutory, and the Government's argument falls to the ground.

2. While it was discretionary with the Court whether or not to release the impounded funds so long as the temporary restraining order was in force, it was mandatory by reason of the purpose of the deposits and the unambiguous terms of the orders, to release them when appellees no longer required any temporary restraining order, and hence no appeal lies.

Under Section 306 of the Packers and Stockyards Act, the appellees as market agencies were required to file with the Secretary a Schedule of Rates, which they did on May 11, 1932. It was thereafter obligatory upon them to charge these rates, and had they not done so they would have been subject to civil and criminal penalties (Sec. 306). Once the Secretary's rates were enjoined, as they were by the temporary restraining order, the appellees not only had the legal right to collect their filed rates but were required by law to do so. Thus the entire proceeds of these rates charged by them belonged to them from the moment the charges were paid by the consignors of the livestock. Pursuant to the temporary restraining order and as a condition thereof, the appellees were required to deposit a part of the proceeds of these collections with the statutory Court. These deposits were required to be made "pending final disposition of this cause" (R. 130). This "cause" cannot possibly refer to anything other than the suit to set aside the Secretary's order. While the temporary restraining order does not expressly provide that the deposits were to be made as security for the possible liability of the market agencies equivalent to the excess sums collected, in the event the Secretary's order should be declared valid in the courts, it may be inferred that such was one of the purposes. The expressed purpose of the temporary restraining order,

however, was to prevent the irreparable injury which would otherwise accrue to the market agencies from inability to collect from the consignors of the livestock in the event the Secretary's order should be declared invalid, as it was. The right of the market agencies to collect their filed rates and charges is expressly conceded in the order, as is the fact that sums equivalent to the amounts of money impounded would be wholly lost to the market agencies "in the event the said petition prayed was finally granted by this court". Such relief having been granted by this Court, the statutory Court had no other option but to order the release of these impounded moneys to the appellees. Whether or not the point goes to the appealability of the order or the utter frivolousness of the appeal, it is unanswerable.

3. The only cases relied on by the Government to sustain the jurisdiction of this Court are not in point.

The only cases relied on by the Government to sustain the jurisdiction of this Court are *B. & O. R.R. Co. v. United States,* 279 U. S. 781; *Atlantic Coast Line v. Florida,* 295 U. S. 301; and the prior decisions of this Court in this *Morgan* case. In the *B. & O.* case the lower court did not fully carry out the mandate of this Court and was required to do so. Nothing in any of the *Morgan* case opinions appears to us to be of any assistance to appellants. Nor is the *Atlantic Coast Line* case in any way in point.

It is difficult to see wherein appellants can derive any comfort from the *Baltimore & Ohio* case, *supra.* In that case this Court reversed a decree of the statutory Court requiring the east side roads to absorb carriage charges across the Mississippi, which decree relieved the west side roads of these charges. As can be seen from the discussion on page 785, the application made to the statutory Court

after mandate requested an order that the west side roads make restitution to the east side roads on account of the charges illegally collected. Such an application was truly called by this Court "an equity proceeding resulting in a final decree." In our case, however, the statutory Court had in the first place no authority to conduct any such equity proceeding because in its final decree (which was reversed) it did not reserve any jurisdiction to do so (R. 170-1). But more important, the order for the release of the impounded funds was a simple permissive order authorizing the clerk to release them, to which appellants were not necessary parties, not "an equity proceeding resulting in a final decree" in favor of one party and against another. Nor did the statutory Court, as it did in the *B. & O.* case, refuse "to give effect to" or "misconstrue" the mandate of this Court so that its action might be controlled by this Court "either upon a new appeal or upon writ of mandamus." On the contrary it acted in strict conformity with the mandate of this Court, just as the lower courts did in *Arkadelphia Milling Co.* v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, and *In the Matter of Lincoln Gas & Electric Co.*, 256 U. S. 512, in which it was necessary to enforce the provisions of appeal bonds. Having done so, it is immaterial whether or not the order is incidental to or a part of the main suit because it merely exhausts the mandate. Had the order deviated from the mandate, there would necessarily be a remedy, as this Court has held. The case does not aid appellants in the least.

Neither the majority nor the dissenting opinion in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, in any way supports the Government's contentions. In that case an order of the Interstate Commerce Commission had required intrastate rates for the transportation of logs, fixed by the

Florida Railroad Commission, to be increased because discriminatory against interstate commerce. The statutory Court sustained the order of the Interstate Commerce Commission. This Court reversed and held the order invalid on the ground that the Commission had failed to set forth the basic findings necessary to support its ultimate finding of a discrimination against interstate commerce.[1] From the date when the Commission's order was made until a decree was entered upon this Court's reversal, the railroad had collected the higher rates required by the order of the Interstate Commerce Commission. After taking additional evidence and upon the basis of new findings,[2] the Commission made another order which was sustained by this Court. The shippers who had intervened applied to the District Court for an order of restitution. It referred the matter to a master and confirmed his report which found reasonable rates to be intermediate between the Commission's rates and the Florida Railroad Commission's rates, and awarded restitution for about one-third of the excess collections made by the railroad. Upon appeal, a majority of this Court held that the shippers were entitled to no restitution, because it would not offend equity and good conscience for the railroad to retain the moneys collected, when it had under the circumstances been compelled to charge the higher rates by Commission and court order.[3] The minority held that the

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[1] *Non constat* that it may not have actually made them.

[2] This is precisely what the Secretary cannot do if he is to "validate" his order *nunc pro tunc*.

[3] The opinion expressly states that there was no claim that conditions affecting reasonableness of rates had changed during the litigation (p. 316). This Court can judicially note that in our case they greatly changed during the period 1933-1937, *e.g.*, livestock prices rose considerably, as indeed the Secretary admits (R. 192).

An important equity also existed in the fact that the Florida state rates were confiscatory.

shippers had a legal right to full restitution because the money was collected under an invalid order.

The case is of no assistance to the Government here. The commissionmen at the stockyards, who are the appellees here, have never collected anything they were not entitled to collect. By virtue of the express provisions of the Act, they were required under pain of civil and criminal penalties to collect the rates filed by them on May 11, 1932, until the Secretary should make a valid order prescribing other rates. He has never made one. Appellees do not need or seek the aid of equity to recover moneys from appellants in a restitution proceeding. The shoe is on the other foot, and without having any equity to do so, appellants are seeking restitution for the consignors. The impounded moneys have always belonged to appellees. The very purpose of the impounding order was, of course, to avoid the necessity of any restitution proceeding. All that was needed by appellees at the most was an order from the Court, ministerial in character, directing the clerk to permit the withdrawal of the impounded funds. The Secretary's order being invalid, and the terms of the impounding order being what they are, the appellants have no concern whatsoever with respect to the making of such an order, which could properly be made *ex parte* without notice to them because it in no way affects their rights.

Nor does the dissenting opinion in any way aid the Government in its contentions. Quite the reverse. Mr. Justice Roberts (with whom the Chief Justice, Mr. Justice Brandeis and Mr. Justice Stone concurred) thought that the railroad was required to make the refunds demanded. The majority opinion was based on the idea that since equitable restitution is a matter of grace, the balance of the equities in the

particular situation justified refusal to refund, irrespective of legal rights. The basis of the dissenting opinion, however, is that, since this Court had held the first order of the Commission to be invalid, it was the same as though it had never been made, and that unless those who had seasonably asserted their rights to refunds were granted such refunds, the Interstate Commerce Commission would have been permitted to unconstitutionally encroach upon the sovereign right of the State of Florida through its Railroad Commission to fix intrastate rates.

The Government, of course, is forced to contend in our case that restitution to the consignors or shippers will not be a mere matter of grace but a matter of right, although the impounded moneys were duly collected during a period which no order of the Secretary can now control, even if he took new evidence and made new findings. Its position is, therefore, opposed to both the majority and dissenting opinions in the *Atlantic Coast Line* case.

II.

Assuming that the order is technically appealable, the appeal is utterly without merit and the stay should be denied.

1. The statute expressly forbids a *nunc pro tunc* order which is the only kind of order the Secretary proposes to make and the only kind which could conceivably affect the impounded funds.

In its *per curiam* opinion (R. 249) the statutory Court, after saying,

> "We consider that the motion of defendants (the Secretary of Agriculture and the United States) *has not the faintest shadow of merit.*"

went on to say:

> "We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it" (R. 250).

The reasons it gave were that the statute[1] expressly requires that any order made by the Secretary shall be made only "after full hearing" and that any rates fixed by the Secretary shall be rates "to be thereafter observed" (Sec. 310).

In the face of these provisions of the statute the Secretary proposes to make an order dated as of a time when even according to his own theory it is indisputable that the concluding parts of the hearing had not taken place. That is, he now proposes to serve upon the market agencies his definitive findings of fact and order, held by this Court to be invalid, as his tentative findings and order, and to permit argument thereon. Thus even yet, taking his own theory at full face value, the "full hearing" is obviously not complete, and, *a fortiori*, it was not complete five years ago. As a result of this reopened hearing, he proposes not to make rates "thereafter to be observed" but to usurp a full measure of judicial power not only in violation of the statute but in violation of Article III of the Constitution and make rates which he shall ordain ought to have been observed during the period June 14, 1933, to November 1, 1937.

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[1]The pertinent sections are printed in Appendix A.

It therefore clearly appears that even if the serious errors made by the Secretary could in any way be cured,[2] they could not be cured to permit his order to have retroactive effect, but only to permit his order to be effective in the future. It is therefore unnecessary to consider the possibility, if any, of their being cured.

There are at least two cogent reasons, moreover, why the Secretary cannot, proceeding as he is proceeding, even make an order to be effective in the future. In the first place, by agreement with the market agencies, he issued new rates effective November 1, 1937, upon an express admission of changed conditions (R. 191-4). In the second place, the record is wholly stale, being directed to the test years 1929 and 1931, and if permitted to be used at all in connection with the making of a new order applicable to the future, must necessarily be supplemented by a full hearing with relation to the conditions obtaining in the years 1933 through 1937 and the reasonableness of appellants' rates in the light of these conditions.[3]

2. The Government's attempt to compel the statutory Court to hold the impounded funds pending further action by the Secretary is based on a wholly fallacious premise.

Even assuming, contrary to the express provisions of the statute, that the Secretary could in some way make a *nunc pro tunc* order as of June 14, 1933, this would be no reason whatsoever for holding up the release of the im-

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[2]*Cf.* this Court's *per curiam* opinion denying petition for rehearing in which it said: "That is more than an irregularity in practice; it is a vital defect."

[3]Any argument that the Secretary will permit new evidence is futile, at least until he withdraws the old findings based entirely on the old evidence.

pounded funds to appellees. The funds were indisputably impounded in connection with the particular "cause" then pending in the statutory Court, to wit, the suit to set aside as invalid the Secretary's order of June 14, 1933. This cause having been disposed of adversely to the Secretary's order, the impounded funds must necessarily be released to those who deposited them. What the Secretary may or may not do thereafter has no bearing whatsoever upon their release. The Court cannot control the Secretary, who is an independent legislative agency, in the performance of his administrative duty, although it may set aside his orders after he has made them. No more can the Secretary control the Court in the performance of its judicial duty. Thus, even if any cogent reason existed, as it does not, for retaining the impounded funds pending action by the Secretary, it is respectfully suggested that this Court does not possess the power to instruct a lower court to comply with the Secretary's wishes when no error in its action is shown.

But no cogent reason does exist for holding up the release of the impounded funds because appellants' argument proceeds upon a wholly fallacious premise. This false assumption is that the Courts in reviewing administrative orders can finally determine that such orders are invalid only by a decision "on the merits" and may not finally invalidate them on procedural grounds. This argument misconceives the nature of judicial review of the orders of administrative tribunals. Such orders are not reviewed "on the merits", although that expression may be colloquially used to distinguish between the always present question of whether the findings are supported by some evidence and other less frequently raised irregularities in the administrative proceeding. The sole function of the reviewing court, except in so far as it reviews the weight of the evidence on

jurisdictional and constitutional questions, is to review the regularity of the proceedings before the administrative tribunal. A holding by the reviewing court that such tribunal has acted arbitrarily and capriciously in making findings without evidence to support them is just as much a holding upon a procedural question as a holding that the administrative tribunal has not afforded adequate opportunity for argument or has failed to consider the evidence before it.

The courts, of course, never make any determinations of their own as to what rates are reasonable in a given situation. Frequently their jurisdiction is invoked to declare that rate-fixing orders are confiscatory, but no such point is involved in this case. *Acker* v. *United States*, 298 U. S. 426. In a situation such as is here presented the reviewing courts merely determine whether there was any evidence before the administrative tribunal to justify its findings with respect to what rates are reasonable. If the court finds that the rates fixed by the administrative tribunal are supported by no evidence, it will set aside the tribunal's order as arbitrary and capricious, not because the court has decided anything "on the merits", but because the procedure of the administrative tribunal has been irregular.

It makes no difference, therefore, what reason influences the reviewing court to invalidate the order of an administrative tribunal, for no matter what the reason was, such an order cannot be later revivified as of the date when it was made, although in some circumstances it is conceivable that the old record can be availed of, at least to some extent, in making an order effective for the future.

The rate orders of the Secretary of Agriculture like those of the I. C. C., are, in effect, statutes applicable to the future. *Arizona Grocery Company* v. *Atchison, etc.*

R., 284 U. S. 370. They must necessarily be based upon
e experience of the past. But when what was the future
ien this order of June 14, 1933, was made, is over and
ne with, and has become the past, it is plainly not pos-
le to ignore it by now fixing rates as of June 14, 1933,
rough the device of a *nunc pro tunc* order.[4] It is said,
wever, that the errors although admittedly serious were
t "jurisdictional". We need not quarrel about words,
t it is clear that the Secretary had no power or jurisdic-
n to make the order declared invalid and has no power
jurisdiction to make the *nunc pro tunc* order he proposes
make.

The statute (Sec. 310) expressly withholds power from
Secretary to make a valid rate-fixing order without hav-
granted "a full hearing". When he refused to state
ecific issues for the market agencies to argue upon, or to
ke known to them his claims or contentions with respect
what the evidence showed, and when he made his pre-
ded order by accepting the findings of his subordinates
er private conferences with them and without himself
isidering the evidence, he did what he had absolutely no
ver to do, and his act was a complete nullity. Had he,
er issuing his order of inquiry, attempted to make a rate-
ng order without having had any evidence taken at all,
order would have been no more invalid. In so far as
validity of his order is concerned, it can make no differ-
e whether he makes findings without evidence in the rec-
to support them, or whether he fails to take any evi-
ce at all, or whether he fails to read and consider the

[4] In his argument before Mr. Justice Butler, Government counsel
ressly admitted that this was the Secretary's sole purpose
ppendix B, p. xxx *post*). See also R. 185 and page 17 of Gov-
nent's opposition to motion to dismiss or affirm.

evidence which has been taken. *Cf. Morgan* v. *U. S.*, 298 U. S. 468, at page 480. In each and every case his order is null and void, and it cannot be resuscitated or revived, five years later, in the teeth of the provisions of the statute.

What then is the great question of administrative law which the Solicitor General (wholly improperly, we think) seeks to make this routine order a vehicle for the decision of? Perhaps it can be posed this way: Can an administrative tribunal, which is both prosecutor and judge, when its orders have been invalidated in the courts for serious irregularities in its conduct of the hearing, proceed to "validate" these orders, not merely for the future but *nunc pro tunc*, and require the courts to stay their hand while it does so and give effect to the "validated" orders when made? If this question should be answered in the affirmative, it is obvious that there is nothing to stop an administrative tribunal acting in its judicial capacity from acceding to all the requests of its prosecuting arm and denying to the other party every statutory or constitutional right it is requested to deny, in the secure knowledge that if its order is finally held invalid by the courts it can proceed to "validate" it *nunc pro tunc* by offering to accord or pretending to accord the right or rights previously denied. Since the courts may invalidate its order for a particular irregularity, without considering other alleged irregularities, as was done in this very case, it may continue to refuse other rights until the courts in the particular case shall have held, perhaps one by one, that they must be accorded, thus conducting a potentially unlimited number of administrative proceedings during which it accords to the litigants before it not the full rights belonging to them under the law, but the only minimum of these rights which it dares not withhold. The mere statement of such a proposition is its refutation.

3. Without having any power whatsoever to do so, the retary is merely attempting to award reparation under guise of a *nunc pro tunc* order.

The statute provides (Section 310) that the Secretary Agriculture may "after a full hearing" upon a complaint upon his own motion, if he finds that existing rates are easonable, prescribe just and reasonable rates "to be reafter observed." It denies the power (Sections 308 309) to make reparation orders, except upon petition the shipper filed within ninety days after the cause of on has accrued. Whether the cause of action accrues n the performance of the services for which the com- sion is charged; that is, the selling of the livestock, or n payment therefor, makes no difference in this case, use it is not claimed that any reparation petitions have n filed within ninety days of either event in any case. held in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, Secretary's order, even if it had been valid, would not entitled any shipper to reparation. Indeed, the Secre- did not attempt to grant reparation for the period n May 11, 1932, to June 14, 1933, when Tariff No. 2 s were collected without impounding.

n the face of these statutory provisions, the Secretary oses to award reparation without the shippers having any timely petitions therefor, and not on the basis of *mony as to conditions in the years 1933, 1934, 1935, and 1937, during which all the transactions claimed to e possible subject of reparation, took place.* He proposes this by "validating" his wholly invalid rate order of 14, 1933, which was predicated upon the now wholly test year 1931. He does not propose to make any for the future but only for the period between June

14, 1933, and November 1, 1937, during which the impounding continued.

Obviously, the Secretary is attempting to award reparation under the guise of "validating" a wholly invalid order, and this entirely upon his own motion, without timely petitions having been filed by the shippers. Even upon his own theory that he is entitled to reopen the proceedings, he was on June 14, 1933, only in the middle of a hearing. And yet he proposes to date his order not as of a date in the future "after a full hearing" has been completed, but as of a date five years ago when the hearing was incomplete. He does not propose to make rates "thereafter to be observed" but only to "validate" his invalid rates because, to his mind, they ought to have been observed during a past period. It is entirely plain that he is utterly without power to do what he proposes.

But were the fact otherwise, it would have no bearing upon the merits of this appeal. The statutory Court has no power to hold, without any authorization in the statute, the impounded funds as security, even for reparation claims which might possibly be established, much less in a situation where no reparation claims have been made and none can be made because all are barred by the ninety-day statute of limitations. The Secretary's orders have only *prima facie* effect in connection with reparation, and judgment can only be obtained in the courts. Assuming that valid reparation claims could possibly be brought at this time, which is

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[5]In denying the Secretary's petition for a rehearing, this Court said:

> "From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below."

ontrary to the fact, they might well be established in other ourts than the District Court for the Western District of Missouri, and could not be established at all in the statutory Court which holds the impounded funds but only before ordinary courts and juries. Do appellants contend that hese funds can be transferred between courts without tatutory authority? It is plain that there is not an iota of ense in the contentions made by appellants, and that the Government's argument rests entirely upon a long series of palpable fallacies and wrong assumptions. Among these re the following:

> 1. That the excess of the proceeds of legally filed rates, over and above wholly invalid rates fixed by the Secretary, cannot be finally and definitively collected until the reasonableness of the filed rates, which must be collected under pain of civil and criminal penalties (Sec. 306), has been adjudicated by the Secretary.

This is plainly untrue, first, because if, as is the fact here, the rates are lower than effective maximum rates duly established by the rate-making agency,[6] they are lawful rates as well as legal rates, and never can be the subject of reparation proceedings. *Arizona Grocery Company* v. *Atchison, etc., R. R.*, 284 U. S. 370. Secondly, it is untrue because the right to reparation is lost by failure to file a claim within the statutory period of limitations, in this case ninety days, no matter how unreasonable the legally filed

[6]Tariff No. 1, established by the Secretary of Agriculture on July 27, 1923, and never attempted to be altered by any subsequent order, except the wholly invalid order of June 14, 1933 (R. 230).

rates may be considered by the Secretary. *Phillips* v. *Grand Trunk Ry., supra.*

2. That the statutory Court, which is a judicial body, has any control over or concern with what the Secretary of Agriculture, who is an agent of the Legislature for rate-fixing purposes, does in the future with respect to making an order, until its jurisdiction is regularly invoked by proceedings to enforce or set aside.

Assuming, therefore, contrary to fact, that the Secretary of Agriculture has the power to make the retroactive order he proposes, and that he should make the same order which he pretended to make on June 14, 1933, this nevertheless would be no reason at all for the Court to delay or bar the return of the impounded funds to the market agencies. *A fortiori*, if there is no "shred of law or reason" in what the Secretary proposes to do, is it not ridiculous to contend that a Court, which has no power to stop him, or direct him aright, must upon his request stay its hand and commit what it regards as an act of bad faith (R. 249) while he proceeds in direct violation of the statute?

3. That the Secretary of Agriculture is not required in good faith to hear and consider the arguments of the market agencies, but may set out to "validate" his wholly invalid order of June 14, 1933, after a perfunctory hearing.

This is the necessary implication of a proposal to "validate" as of June 14, 1933, because it is obvious that unless the terms of the new order should be precisely the same as those of the wholly invalid order of June 14, 1933, it could

assuming all of the Secretary's arguments are sound, ibly be dated as of that date.

4. That in determining the validity of the existing rates which appellees filed under the Act, the substantive provisions of the Act can be separated from the procedural provisions.

While rates "to be thereafter observed" can always be e at any time "after a full hearing," the rates duly with the Secretary of Agriculture by the market agenare legal and conclusively presumed to be reasonable in ar as reparation is concerned as against any shipper has not within ninety days after he paid for the servfiled a claim for reparation; and if, as is the case of rates in question, they are lower than maximum rates iously authorized by the Secretary, they are conclusy presumed to be valid even if timely petitions for ration are filed. *Arizona Grocery Case, supra.*

5. That the impounded funds can be considered in some way as being security for reparation claims, even if such timely claims could now be made, the fact being that none can now be made because over six months have elapsed since the impounding ceased.

Reparation claims are tort claims for damages. It is rd to contend that they are secured by the impounded s.

6. That upon the termination by limitation of the temporary restraining order (as a condition of obtaining which the provision for impounding was

made), and the "cause" having been disposed of, the market agencies did not automatically become entitled to an order permitting them to withdraw these funds.

7. That it was the absolute right of appellants to have a stay of distribution from the statutory Court, and that it was not even discretionary with it to refuse to stay the distribution of the impounded funds and turn them over to their rightful owners.

8. That the statutory Court was ever empowered to make its own findings upon the weight of the evidence, and if it were so empowered, that its findings now invalidated by this Court can have any bearing upon the reasonableness or unreasonableness of the rates filed by the market agencies as Tariff No. 2, and especially in view of the fact that the actual findings of the statutory Court were that the Secretary's findings were contrary to the weight of the evidence on the most important subjects (R. 240-1).

All the statutory Court was empowered to do, in any event, was to determine whether the Secretary's pretended order fixing "reasonable rates" was supported by some evidence. Since the Secretary's order was wholly invalid for other reasons, it was not even empowered to do that.

9. That even if the Secretary's order had been upheld by this Court as valid, any reparation could have been ordered by him in the absence of timely petitions therefor filed by the shippers. *Phillips v. Grand Trunk Ry.*, 236 U. S. 662.

10. That the pendency of the litigation over the Secretary's order of June 14, 1933, in any way prevented the filing of reparation claims with the Secretary or action thereon by the Secretary.

Of course, the Secretary, if he had accorded "full, fair and open" hearings, could have awarded reparation to shippers who filed petitions therefor, and the shippers would not have had to put their sole reliance upon the security of the impounded funds which was of no value to them if the Secretary's order should be held invalid as it was. Plainly the Act intended to discourage reparation claims by providing for a short statute of limitations and for individual action. Since a reparation order of the Secretary is only *prima facie* evidence in the courts (Sec. 309f), it is obvious that some reparation claimants may win and some may lose on the same state of facts. This is the result intended by the statute, and the Secretary's argument that it is unjust should be addressed to the Congress and not to this Court.

11. That the result of reparation proceedings would necessarily have been the same as if the Secretary's order made upon his own motion had been held valid and had thus resulted in refunds to the shippers from the impounded funds, if the repayment were not otherwise made.

Obviously, for the reasons just stated, the results might be very different; and again the argument as to unfairness should be directed to the Congress and not to this Court.

12. That without being in a position to fix any rates for the future, which could apply to this case, the Secretary can, by "validating" his wholly in-

valid order of June 14, 1933, as the "public representative" of the shippers, award reparation in the absence of timely complaints from shippers, on a foundation of findings made on evidence having no relation to the situation in the years 1933-1937, during which all the transactions by reason of which reparation might have been claimed if the rates were unreasonable, took place. *Phillips* v. *Grand Trunk Ry., supra.*

13. That any shipper, under any circumstances, now that the Secretary's order of June 14, 1933, has been declared invalid, can have any claim against the impounded funds.

14. That the date June 14, 1933, has any such special significance that a new order made by the Secretary could be dated as of this date.

It is merely the date when the Secretary signed a piece of paper, and has no more significance than the date of his original order of inquiry, the date of his order for a rehearing, or the date of his attempted reopening of the proceedings before him. At the most it is merely a date in the middle of the administrative proceedings when nothing valid or definitive had taken place.

Appellants have judiciously refrained from making any argument in their brief on the merits of their appeal. Therefore by reason of the fact that it so clearly shows the complete lack of merit in this appeal, we annex hereto as Appendix B the transcript of the argument before Mr. Justice Butler upon application to him for a stay. From this and the briefs upon our motion to dismiss or affirm

it clearly appears that nothing more remains to be said and that no purpose whatever would be served by oral argument.

It is respectfully submitted that the application for a stay should be denied.

Respectfully submitted,

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Dated, September 10, 1938.

APPENDIX A

Packers and Stockyards Act of 1921, as amended.

(7 U. S. C., c. 9, Sections 181-229; c. 64, 42 Stat. 159, et seq.)

Title III.—Stockyards

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give

notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.[1] It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided,* That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to

[1]Amended by an act of Congress approved May 5, 1926.

ply with the orders of the Secretary under this act he is horized to revoke the registration of such department or ncy and to enforce such revocation as provided in sec- 315 of this act.

SEC. 305. All rates or charges made for any stockyard ices furnished at a stockyard by a stockyard owner or ket agency shall be just, reasonable, and nondiscrimina-, and any unjust, unreasonable, or discriminatory rate harge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary given public notice that a stockyard is within the defi- on of section 302, by posting copies of such notice in the kyard, the stockyard owner and every market agency ich stockyard shall file with the Secretary, and print and open to public inspection at the stockyard, schedules wing all rates and charges for the stockyard services nished by such person at such stockyard. If a market ncy commences business at the stockyard after the ex- tion of such sixty days such schedules must be filed ore any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and rges in such detail as the Secretary may require, and ll also state any rules or regulations which in any manner nge, affect, or determine any part or the aggregate of h rates or charges, or the value of the stockyard services nished. The Secretary may determine and prescribe form and manner in which such schedules shall be pre- ed, arranged, and posted, and may from time to time e such changes in respect thereto as may be found ex- ient.

(c) No changes shall be made in the rates or charges iled and published, except after ten days' notice to the retary and to the public filed and published as aforesaid, ch shall plainly state the changes proposed to be made the time such changes will go into effect; but the Sec- ry may, for good cause shown, allow changes on less

than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a

ckyard owner or market agency unless the rates and arges for the stockyard services furnished at the stockrd have been filed and published in accordance with this tion and the orders of the Secretary made thereunder; r charge, demand, or collect a greater or less or different mpensation for such services than the rates and charges cified in the schedules filed and in effect at the time; nor fund or remit in any manner any portion of the rates or arges so specified (but this shall not prohibit a cooperae association of producers from bona fide returning to members, on a patronage basis, its excess earnings on ir livestock, subject to such regulations as the Secretary y prescribe); nor extend to any person at such stockrd any stockyard services except such as are specified in ch schedules.

(g) Whoever fails to comply with the provisions of this tion or of any regulation or order of the Secretary made reunder shall be liable to a penalty of not more than $500 each such offense, and not more than $25 for each day ontinues, which shall accrue to the United States and y be recovered in a civil action brought by the United ites.

(h) Whoever willfully fails to comply with the provins of this section or of any regulation or order of the retary made thereunder shall on conviction be fined not re than $1,000, or imprisoned not more than one year, or h.

SEC. 307. It shall be the duty of every stockyard owner market agency to establish, observe, and enforce just, sonable, and nondiscriminatory regulations and practices espect to the furnishing of stockyard services, and every ust, unreasonable, or discriminatory regulation or prac- is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, lealer violates any of the provisions of sections 304, 305, , or 307, or of any order of the Secretary made under

this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's

fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or han-

ling, not in commerce, of livestock, causes any undue or nreasonable advantage, prejudice, or preference as beveen persons or localities in intrastate commerce in vestock on the one hand and interstate or foreign comerce in livestock on the other hand, or any undue, unjust, r unreasonable discrimination against interstate or foreign ommerce in livestock, which is hereby forbidden, and eclared to be unlawful, the Secretary shall prescribe the ate, charge, regulation, or practice thereafter to be obrved, in such manner as, in his judgment, will remove ich advantage, preference, or discrimination. Such rates, harges, regulations, or practices shall be observed while in ffect by the stockyard owners or market agencies parties such proceeding affected thereby, the law of any State r the decision or order of any State authority to the ontrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard wner, market agency, or dealer to engage in or use any nfair, unjustly discriminatory, or deceptive practice or deice in connection with the receiving, marketing, buying or elling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in ommerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by ny person, or whenever the Secretary has reason to believe, hat any stockyard owner, market agency, or dealer is violting the provisions or subdivision (a), the Secretary after otice and full hearing may make an order that he shall ease and desist from continuing such violation to the extent hat the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all rders of the Secretary under this title, other than orders r the payment of money, shall take effect within such reanable time, not less than five days, as is prescribed in the rder, and shall continue in force until his further order, or r a specified period of time, according as is prescribed in e order, unless such order is suspended or modified or set

aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

APPENDIX B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
Appellants,

vs.

F. O. MORGAN, doing business as F. O. MORGAN SHEEP COMMISSION COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

WASHINGTON, D. C.,
Wednesday, July 13, 1938.

A meeting was held in the Chambers of Mr. Justice Butler, at 11 o'clock a. m., for argument on a petition for an order staying and superseding the final order and decree of the District Court of the United States for the Western District of Missouri, entered on June 18, 1938, in the above-entitled cause.

APPEARANCES:

On behalf of the Appellants:

MR. THURMAN ARNOLD, *Assistant Attorney General.*

MR. WENDELL BERGE, *Special Assistant to the Attorney General.*

On behalf of the Appellees:

MR. RICHARD H. WILMER.

MR. THOMAS T. COOKE.

MR. JUSTICE BUTLER. A petition has been filed for an order staying and superseding an order of the United States District Court for the Western District of Missouri, in a case in which the United States and the Secretary of Agriculture are the appellants, and F. O. Morgan, doing business as F. O. Morgan Sheep Commission Company and others, are appellees. The petition does not appear formally to be addressed to me, but it is to be inferred from its form that it is addressed to the Court. I cannot act as a Court, and unless it be amended to be addressed to me as a Justice of the Court, there will be no use in taking time in addressing arguments to me.

MR. ARNOLD. May we amend?

MR. JUSTICE BUTLER. Yes. I will hear the applicants.

Argument of Mr. Thurman Arnold, Assistant Attorney General

MR. ARNOLD. As your Honor will recall, the United States District Court for the Western District of Missouri upheld an order of the Secretary of Agriculture prescribing maximum rates, and this Court reversed that decision for a procedural defect, to wit, that reasonable opportunity to know the claims of opposing parties was not given to the marketing agency, and that there was no concrete statement of the claim. I will not review that, because I assume your Honor is familiar with it. I will briefly review the proceedings subsequent to the opinion.

Your Honor will recall that one of the points made by the Solicitor General on the petition for a rehearing was that the first opinion of this Court involved turning over the impounded funds to the marketing agencies which had been held not to be entitled to them on the merits. That was intimated by the Solicitor General, and was definitely claimed by the attorneys for the marketing agencies. In denying the petition for rehearing the Court specifically stated that this question had not been decided, that the

disposition of the funds was not before the Supreme Court of the United States, and that the subsequent orders which the Secretary might make, and the matter of the disposition of those subsequent orders, were to be determined by the District Court, and were not questions open on the present state of the record, a position which I think is quite correct because no court should decide on the validity of any order of the Secretary concerning these funds or the disposition of the case on its merits before it was made.

After that opinion denying the rehearing had been handed down, the Secretary of Agriculture, in an attempt to conform to the suggestion of the Court and to cure the procedural defect, reopened the proceedings and served findings on the marketing agencies, and gave them 30 days in which to file exceptions. Then the defendants, the Government, moved to stay further proceedings and that the money be retained, and at the same time the marketing agencies moved for an order to pay out the impounded funds.

Next, the District Court, by a decree, set aside the Secretary's order and at the same time directed that the impounded funds be disbursed forthwith.

From that final order and decree an appeal was taken to this Court, and along with the petition for appeal the Government asked for an order staying the distribution of the impounded funds pending the appeal. The appeal was granted, but the petition for the stay was denied by the District Court on June 30th.

If the stay is not granted, we think this question will become moot, and that our right of a hearing on the question by the full bench will be destroyed. We are not here to argue the merits of the appeal, but only to seek an opportunity to present the merits of the appeal to the full bench.

I think that is exactly what the Supreme Court intended to give us. I will read the last paragraph of the decision in their opinion on the rehearing. The Court said:

"The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide."

It would seem that if our objections are not frivolous the appeal from the disposition which the District Court actually made should be heard by the full bench, and it would seem to me that the only thing to be decided here is whether our objections are frivolous.

The lower court in effect passed on the order before the Secretary made it, in other words, it made a decision before the Secretary had taken any of the steps which are suggested by the court. What steps the Secretary would take of course is a hypothetical question, and this Court said it should not attempt to forecast or hypothetically decide that question. Of course we think that that is exactly what the District Court in effect did, and that certainly that objection is well-taken.

As to whether the Secretary has power to do anything in this circumstance, it would seem to me that we certainly would have a right to appeal on that, because the questions are of grave importance.

The question really revolves around this situation. Assume that there is a procedural defect in this case, the absence of the full opportunity to argue upon the findings which had been submitted in advance; assume a procedural defect. Is it jurisdictional, or is it not jurisdictional? That is a question of tremendous and far-reaching importance in our whole administrative set-up. We are not here suggesting as to whether our contentions are right or wrong, but only that it is of the greatest importance that we get an opinion of the full bench on that question, for the purpose of knowing what we are to do ourselves, for the purpose of knowing whether proper changes in the law, clarifying the effect of amendment for procedural defects, should not be made. I take it that the denial of the stay is simply to deny us any chance of having that question passed upon by the full bench.

There is an additional point which is of tremendous interest, not so much to the Department of Justice or the Government in its administrative interpretation, but a plain, simple question of justice. There is certainly no injustice done to the shippers in staying these proceedings and having this matter all decided in one suit.

MR. JUSTICE BUTLER. Whom do you mean by "shippers"?

MR. ARNOLD. I mean the market agencies. I should not say "shippers;" I should say the market agencies, in this case. In other words, it would seem to me that, so far as their own interests are concerned, they will get an important decision here which would have to be arrived at by a very complex process otherwise. That of course depends on whether there is any merit at all in our complaint. Further than that, the actual effect of the position taken by the attorneys for the market agencies is to have a procedural defect determine the merits of the case, which has been decided by the lower court, and on which the Supreme Court has not specifically passed.

Finally, the very provision of the order under which these funds are kept reads that they are to be impounded during the pendency of the cause. If this cause is not finally determined, if it may be reopened after the opinion of the Court pointing out the procedural defect, then this cause is still pending, and the funds must be impounded, and once they are turned loose, it can only be on the theory that the cause has been terminated. That is a question which we do not think we should argue before your Honor, because we conceive our position here to be only that we should have on that and these other questions a hearing before the full bench, that the question is one of enormous importance, that it should be settled as expeditiously as possible, and that there is no reason in law or in justice why we should be in substance deprived of our appeal from the order of the Court which it seems to me quite clear the opinion on the rehearing indicated the Court intended to give us.

That, your Honor, is all I care to say, but I have asked Mr. Berge not to argue the merits of the questions which will probably be presented on this appeal, but merely to outline them for you, to the end that you may be able to see that they are not of such a frivolous character that our appeal should be in effect denied.

Argument of Mr. Wendell Berge, Special Assistant to the Attorney General

MR. JUSTICE BUTLER. I would like to have you state for the record the provision of the decree from which you appeal, the words of the decree.

MR. BERGE. Of course, the provisions of the decree from which we appeal are rather long. The decree provides that the aggregate amount of the impounded money, which is stated to be $586,000 and something over, should be restored and refunded to each of the plaintiffs, as set forth in exhibit made a part of the order, which details the names

of the plaintiffs, the amounts they have paid in, with certain deductions from them, and the net amounts due to the plaintiffs. Then it appoints certain parties to act as custodians of the funds, and to work out the mechanics of the refunding process, and certain specific directions to those custodians are given.

MR. JUSTICE BUTLER. Your petition for appeal identifies the clauses of the decree from which you have read?

MR. BERGE. We appeal from the whole decree, your Honor.

MR. JUSTICE BUTLER. Is this decree a part of the decree setting aside the order, or is it a separate matter?

MR. BERGE. No; there were two separate decrees.

MR. JUSTICE BUTLER. Then this order was made upon the petition of the agencies for the return of the deposits?

MR. BERGE. Yes. The Government did not oppose the entry of a decree on the mandate enjoining the enforcement of the Secretary's order, but motions were made.

MR. JUSTICE BUTLER. What does that decree state?

MR. BERGE. It does not recite anything with respect to the impounded funds.

MR. JUSTICE BUTLER. What does it say with respect to the order in question?

MR. BERGE. The decree merely recites that—

> "The decree entered herein on July 9, 1937—

That is, the old decree, which was appealed from, the case heard by this Court the past winter—

> "The decree entered herein on July 9, 1937 is hereby vacated, set aside and for naught held."

Then it states that—

> "The purported order of the defendant, the Secretary of Agriculture of the United States of June 14, 1933, referred to and made a part of the petitions of the respective plaintiffs as Exhibit 'A', and

the same is hereby decreed void and of no effect, and is permanently suspended, enjoined, set aside and annulled, and the defendant, Henry A. Wallace, Secretary of Agriculture, and each and all of the officers, attorneys, solicitors and agents of the United States and all other persons acting or claiming or assuming to act, by or under the authority of the defendants, or either of them, are hereby forever restrained and enjoined from instituting, prosecuting or aiding in instituting or prosecuting any proceeding or action in respect of the enforcement, operation or execution of said order, and each and every part thereof.

"And it is further adjudged and decreed that such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July, 1933 as to law and justice may appertain, and that the parties may apply to this court upon the foot of this decree for such further orders and directions as may be necessary or seem meet and proper to the court with respect to the funds and moneys so impounded."

MR. JUSTICE BUTLER. There is no appeal from the decree setting aside the order of the Secretary?

MR. BERGE. That is correct.

MR. JUSTICE BUTLER. Prescribing the charges and restraining their enforcement?

MR. BERGE. Yes.

MR. JUSTICE BUTLER. That is final.

MR. BERGE. That order is entered pursuant to the mandate of this Court, and it is not appealed from.

Following the entry of this decree the market agencies made motions for immediate distribution, the Government made motions to stay the distribution, and hearing was held on them.

MR. JUSTICE BUTLER. What are the provisions of the order of the Court under which the deposits were made?

MR. BERGE. A temporary restraining order was granted, with consent of the Government, when this suit was instituted, and after restraining the enforcement of the order pending the litigation, this provision was appended:

> "Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

That order was from time to time extended.

MR. JUSTICE BUTLER. Was there any order providing for the disposition of the fund, or specifying the conditions upon which it would be disbursed?

MR. BERGE. There was no order, your Honor, until this order from which we are now appealing.

MR. JUSTICE BUTLER. I mean any provision in any of the orders requiring the deposits.

MR. BERGE. No. My recollection is that this is the only order entered with respect to the deposits except that from time to time there were stipulations and orders extending the application of this. For a time it was extended every 30 or 60 days. Later a stipulation was entered that this order should be in effect throughout the litigation.

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MR. JUSTICE BUTLER. Is there controversy between the parties as to how it should be construed?

MR. BERGE. I think to this extent there is, that as to this clause, "and pending final disposition of this cause," I believe the market agencies would contend that the cause is terminated, and we would contend that the cause is still open.

MR. JUSTICE BUTLER. What do you mean by "the cause"—the suit to set aside the order? Is that what you mean by "the cause"?

MR. BERGE. We would contend that the initial suit which was brought is not terminated as long as the money is held by the court and until appropriate proceedings have been taken with respect to the money pursuant to this Court's mandate. We contend, in other words, that it was clear from the paragraph of the opinion of this Court which Mr. Arnold read that the question of the distribution of the moneys was an open one, to be considered in relation to whatever proceedings the Secretary may have instituted, and was not foreclosed merely by the decision of this Court that the order was invalid for want of a proper hearing, that that does not conclude the disposition of the funds.

MR. JUSTICE BUTLER. Is there any difference between the parties as to the purpose for which the deposits were made?

MR. BERGE. I suppose there is. I think the Government would take the position on the appeal that it was contemplated, when the deposits were made, that there would be a decision on the merits, and that of course the precise course of this litigation could not be forecast in anybody's mind.

MR. JUSTICE BUTLER. The decision of what on the merits?

MR. BERGE. As to the validity of the order.

MR. JUSTICE BUTLER. What do you mean by that? I do not quite follow you.

MR. BERGE. As to whether or not the order of the Secretary was fair and reasonable, and can be supported by evi-

lence. We take the position on this appeal that the decision of the Court that the order was invalid for want of a proper hearing does not necessarily foreclose the disposition of the money, that the money was impounded because it was contemplated at the time that there would be a decision as to whether the rates in question were fair or unfair, and that the money should be held at least a reasonable time until the Secretary has had an opportunity to correct the defect which this Court found to exist in the procedure.

What I would like to do is just briefly to state the issues which our appeal presents, not with the thought at all of arguing them.

MR. JUSTICE BUTLER. I have not quite made my purpose clear. I wanted to ascertain whether the parties are in agreement as to the purpose for which the deposits were made. The language which you read was merely that each of these plaintiffs would at stated times deposit with the clerk of the court the amount of money that was represented by the difference between the old rates and the rates which were challenged, the prescribed rates which were challenged. What was the purpose of that deposit? What does the Government say the purpose of that deposit was?

MR. BERGE. Stating it in general terms, and non-technically, we think the difference was deposited until it could be determined whether or not the rates prescribed by the Secretary were fair and reasonable, or whether they were unfair.

MR. JUSTICE BUTLER. For whose benefit were the moneys deposited?

MR. BERGE. I suppose the answer to that question depends on what the ultimate determination of the question of the fairness of the rates is. The moneys were held for the shipper in the event the rates were held to be fair, for the commission men in the event the rates were held to be unfair. We do not concede, we do not believe, that it was contemplated that the disposition of the money should depend on a procedural defect, without a determination as to the fairness, if there be machinery for correcting the procedural

defect, as we think there is. So the money was held not technically in escrow, but perhaps analogous to escrow. It was held to await the determination of the question of the fairness of the rates, as to whether the money should go back to the rate-payers, or to the commission men. To answer the question practically, this is an outcome which no one could foresee, and was not in anybody's mind.

MR. JUSTICE BUTLER. What were the grounds on which the order was attacked?

MR. BERGE. It was attacked on a great many grounds.

MR. JUSTICE BUTLER. What was the first ground of attack in the bill of complaint?

MR. BERGE. I do not recall all the recitations chronologically, but I think the first one chronologically in the petition was that the procedure was unfair; but that was one of a dozen.

MR. JUSTICE BUTLER. Unfair in what respect?

MR. BERGE. In the first place, they allege that each of them was entitled to a separate hearing. That question never reached the Supreme Court. The District Court held that was not a proper objection, and struck that allegation, and they did not press it further. They tried to present the question that their rights were not joint but several, and should be severally heard, and they alleged that it was improper not to furnish them with a tentative report, tentative findings, to which they could file exceptions.

MR. JUSTICE BUTLER. Was not the ground on which the decision rests alleged in the bill, that the Secretary did not hear or decide the case?

MR. BERGE. Yes.

MR. JUSTICE BUTLER. That was the sole ground on which the order was held invalid and has been decreed to be invalid?

MR. BERGE. That is the sole ground on which the decision of the Supreme Court rests, yes.

MR. JUSTICE BUTLER. And the mandate is carried with it, the judgment?

MR. BERGE. That is correct.

MR. JUSTICE BUTLER. So that the bill attacks the order as invalid on several grounds, the first of which was the ground on which this Court rested its decision, that the Secretary did not comply with the statute in respect of hearing and deciding the case. Am I right about that?

MR. BERGE. Yes, I think your Honor is right in stating that the ground on which the decision was made by this Court was among the grounds pleaded. I do not want to say without reexamining the petition that it was the first ground.

MR. JUSTICE BUTLER. Whether it was the first or the second or the last——

MR. BERGE. We are not contending that the ground of this Court's decision went beyond the pleadings, although the pleadings did not allege it in quite the manner of a final decision. But there is an allegation that the Secretary did not grant a fair hearing and there are numerous detailed allegations with respect to it, some of which this Court adopted, and some of which we think it did not.

MR. JUSTICE BUTLER. If the order had been sustained, then what would have become of the money in accordance with the order on which it was deposited?

MR. BERGE. I cannot conceive that there could have been a decision sustaining the order without holding that the rates were fair and reasonable. If this Court had been otherwise inclined to view the case, had decided that the hearing was fair, they would have to proceed to decide the merits.

MR. JUSTICE BUTLER. Was the issue of fairness or reasonableness of the rates for the District Court or for this Court?

MR. BERGE. I think it was decidedly for both Courts.

MR. JUSTICE BUTLER. That is, whether the rates were reasonable? What do you mean by the fairness of the rates? Is that a judicial question?

MR. BERGE. I am speaking perhaps loosely, but the language of the statute I think is "just and reasonable."

MR. JUSTICE BUTLER. That is for the Secretary.

MR. BERGE. In the first instance.

MR. JUSTICE BUTLER. If he ascertains it in procedure conforming to the statute, that is the end of it, is it not?

MR. BERGE. Unless on final review it is held that there is no substantial evidence to support it.

MR. JUSTICE BUTLER. I know, but there is no judicial question as to the reasonableness of the rates. There is a question of law as to whether there was any evidence on which the determination might rest. You are not suggesting here, are you, that the Court was called upon to decide or could have decided if it had been called on to decide whether the rates were fair or just or reasonable or non-discriminatory, are you?

MR. BERGE. No. I was perhaps using language rather loosely, but I was thinking that if your Honors had held that there was no substantial evidence to support the order, that would have been to hold that the Secretary's findings were unreasonable. I think myself in terms of the latter reasoning when there is no question of confiscation involved. I conceive of this case as being one where there was no confiscation, hence there is no question of de novo judgment of the courts. On the other hand, whether the Secretary acted with substantive evidence or not is a question for judicial review, and is a question which is properly presented to the Court. When I used the word "reasonableness", I used it in that connotation, and perhaps that is not a correct technical description of it.

The real question, undoubtedly, which the parties thought was submitted to the District Court, was whether or not there was substantive evidence to support the findings, and of course the plaintiffs, the first time the case was heard in the District Court, also urged that the rates were confiscatory. That was before the decision of this Court in the Acker case. We contended there was no question of

confiscation, and until the first decision of this Court I think the parties viewed the hearing point as decidedly a subsidiary point. In the first place, after the District Court granted the Government's motion to strike those procedural allegations, opponents took their exceptions. There was no appeal from that order, and on the final appeal both sides devoted approximately 200 pages of their briefs to the merits, and about five or six pages to the hearing point, and similar time on oral argument was devoted to those issues. If we want to look beyond the technical pleading situation to what was in the minds of the parties, I am sure that throughout the course of this litigation, until the first decision of this Court, it was a question of whether the rates were substantially supported by evidence, or whether the action of the Secretary was arbitrary.

I do not at this time care to argue the questions which we conceive to be involved in the appeal and which should, we think, be fully heard, because whether we are right or wrong, the question is immensely important, as Mr. Arnold has indicated. It is important to the administrative arm of the Government to know whether the procedural mistake in this case, even though serious, conceding the seriousness of it and the unfair effect which it may have on the rights of private parties, a mistake made in good faith in the administration of the law after years of administrative proceedings—and I might parenthetically note that this proceeding originated in 1929, with two long hearings, involving many months and the expenditure of considerably more than $50,000 by the administrative branch of the Government in developing the case, all done in the belief that they were acting according to the forms of law, and a decision by the District Court on the merits, once reaffirmed, twice in the record, a decision that the rates not only were supported by substantive evidence, but were supported by the weight of the evidence.

The importance of the question to us is whether a procedural error, however serious, is going finally to deter-

mine substantive rights, if there be a method open for correction of that error which does not prejudice the rights of any of the parties, and even though we may be wrong in our belief that it can be done by this method, it is important to have a determination by the Supreme Court so that, first, the administrative arm of the Government will know, and, second, so that intelligent consideration can be given to the question of amending the law, because the practical effect of this sort of action is quite disastrous to the rate-making power.

Before I outline, briefly, what the issues on the appeal will be, I want to note that we concede, of course, that the impounded funds should not be paid over to the shippers at this time.

MR. JUSTICE BUTLER. Whom do you mean by "the shippers"?

MR. BERGE. Those who ship livestock to the Kansas City market, and who would get this money back.

MR. JUSTICE BUTLER. The consignors.

MR. BERGE. The consignors of livestock who would be the ultimate beneficiaries of this fund if this order had been upheld, or if, as we believe, it may be properly corrected. We are not asking that the money go back to the shippers at this time.

MR. JUSTICE BUTLER. You mean the consignors. I cannot accept the idea of shippers, in some way. Mr. Arnold thought the shippers were the agencies.

MR. BERGE. Mr. Arnold I think on that point just misspoke. In our loose talk around the office we describe the consignors as the shippers.

MR. JUSTICE BUTLER. Let me see if I understand the purpose of this deposit. I think that is essential to your application. Let us take the case of Morgan. He sold for Farmer A a carload of cattle after the new rates fixed by the Secretary's order became effective. He sought to have that order enjoined and he went to the court and asked for restraint pending the suit, the determination of the case. Am I right about that?

MR. BERGE. You are.

MR. JUSTICE BUTLER. And by consent of the parties, or acquiescence of the parties and the court, no temporary injunction was ever granted as a temporary injunction, but merely a restraining order, continued from time to time by consent. The court presumably—though you have told me nothing that indicates that it so ruled—indicated that the restraint would only be granted upon condition, and that condition was that security be given for restitution of the excess. Is that it?

MR. BERGE. Yes, that is it. Of course, if you want to know actually how the thing was presented——

MR. JUSTICE BUTLER. I want to know, if I can, whether the parties agreed upon the conditions on which the deposits were made, that is, whether they construed the record alike, and if so, I want to know that construction, and if they do not agree about it, I want to know your construction of it. We will say that there was $10 difference between a charge made by Morgan and that prescribed by the Secretary's order, which has been held invalid. On what condition was that $10 deposited, according to your construction of the record?

MR. BERGE. According to our construction of the record that $10 was deposited pending final disposition of the cause and we say that the cause has not terminated until there has been a full hearing on the Secretary's right to correct a procedural defect. I do not see how I can answer that question any more plainly than that.

MR. JUSTICE BUTLER. If the decree of the District Court upholding the order had been affirmed, then, according to the terms of the deposit as you construe it, what would have become of the money?

MR. BERGE. If the decree of the District Court had been upheld the order holding that the order was within the Secretary's power and was amply supported by evidence, hence was not arbitrary, therefore, in effect, was fair, the money would go back to the consignors.

MR. JUSTICE BUTLER. Was it deposited to be paid by the clerk of the court to the consignors, or as security that Morgan & Company would make restitution?

MR. BERGE. Of course, the order does not speak on that subject but knowing the practical aspects of this business to some extent I think it was probably in the minds of the parties that the money would be paid to the consignors under supervision of the court because many of these men would have been unable to make separate payment and it would naturally be assumed that during the course of the operation some of them would go out of business. They are not men who operate with large capital.

I think no doubt it was contemplated that when the validity of the order was finally settled, the question with respect to the power to enter the order, and whether it was substantially supported by evidence, the court would then make disposition of the money in accordance with the equities of the situation, and outline in the decree, as is generally done in decrees with reference to refunding, the detailed mechanics of the procedure. I do not think it could have been contemplated at that time that all of those details would be worked out. In the other cases of this nature we have handled, the original orders were pretty general in terms, and at the conclusion of the litigation we tried to work out a decree which would do full equity in view of the decision of the Supreme Court.

I just thought of it at the time, I am not sure that the analogy is fully applicable, but at the same time the Acker case was up, there was heard an appeal in the Corrick case. You may recall that before the Acker case reached this Court the lower court had terminated the impounding against our objection on some technical grounds. I cannot recall in detail, but we came up with two cases presenting the situation where there had been impounding through a part of the litigation, and we were appealing from an order which terminated it and also an order which in effect terminated the order of the Secretary on some grounds with

which we disagreed. We won both of those cases. This Court affirmed the Acker case and reversed the Corrick case, which left a situation in which the consignors were entitled to full refunding but there was in the coffers of the District Court only enough money to cover the refunding up to the time of the decision in the Corrick case. We were able to work out a separate decree in each case which required a refunding through the court as to a part of the money and through the Commission as to the other part.

MR. JUSTICE BUTLER. So that the funds would be regarded as security in the nature of a bond to make restitution, and if they make restitution, that is the end of it; if they do not, suit is brought on the bond.

MR. BERGE. I would suppose that in the case where a bond is given, the commission men would make their refunds direct, and merely come into court with proof that they had fully complied, whereas where there is impounding, the custom has been to make the refunds direct, the money never goes through the hands of the commission men.

I should like to allude to the fact that there cannot be any real hardship worked in this case by granting this stay until the appeal can be heard. The impounding commenced five years ago this month. The original restraining order was entered on July 22, 1933. The impounding, however, was terminated last fall, in October, when the Secretary, on an informal presentation of facts, agreed that prospectively from that date they were entitled to the higher rates, and the rates which were put into effect pursuant to stipulation filed with the Secretary were sufficient to terminate the impounding. There has been no impounding since last October.

Your Honor asked me some questions about that matter at the time the appeal was argued this past spring. So that the commission men are not required to make any further impounding, if this stay is granted, are not required to pay any more money into court.

MR. JUSTICE BUTLER. The rates currently to be charged since November, 1937, are not in controversy?

MR. BERGE. That is true.

MR. JUSTICE BUTLER. The only thing that is in controversy is whether the parties who made these deposits, having obtained the decree that the order prescribing the lower rates was invalid, are now entitled to have the deposits returned to them. That is the only question, is it not?

MR. BERGE. Yes, your Honor.

MR. JUSTICE BUTLER. Let us assume that the money is returned to one of them, or to each of them. How does that affect any action the Secretary is empowered to take in respect of the rates which were applicable in the period from the commencement of the litigation to November 1, 1937, when the Secretary then changed the order and put in an order which was accepted by the agencies and published in their tariffs? So far as that period is concerned, how does the disposition of the funds, whether they are put up as security or put up to be reimbursed, affect his power?

MR. BERGE. So far as his jurisdiction, his lawful power, is concerned, I do not think it affects it, but the District Court in this case was a court of equity, and this is a suit where equitable considerations should determine. As a practical matter if the Secretary enters an order to correct his procedure, and if that order be upheld, it is going to mean thousands of reparations claims, and it is going to throw the whole situation into practical turmoil, because these commission men need this money, that is, they want the money. Some of them have gone out of business. I do not know exactly how many, but about ten of them have assigned their interests in the fund, either voluntarily or as a result of judgments, and this money will be scattered to the winds if it is paid back.

MR. JUSTICE BUTLER. In order that it may be taken by the reporter, will you cite the provisions of the statute, the act, under which the Secretary claims power to deal with

he rates during the period of litigation, up to November 1, 1937? That is the important question to which Mr. Arnold referred. It is the important question emphasized by the Solicitor General, and it is the important question you emphasize. Am I right?

MR. BERGE. Yes.

MR. JUSTICE BUTLER. Let us have the statutory provisions on which you rely.

MR. BERGE. Of course we do not contend that there is any language which expressly authorizes the entry of an order to correct a procedural defect but we contend that that power is inherent in an administrative body, just as it is in the case of a court to correct a judgment. I shall read the provisions with respect to the Secretary's rate-making power. Section 310 provides that—

> "Whenever after full hearing upon a complaint made as provided in Section 309"—

Section 309 provided for the initiation of proceedings on complaints—

> "or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative—"

That is, he may act either on complaint, or initiation by himself—

> "either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—
>
> "(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or

charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

There is nothing said there about the power to correct a procedural defect.

MR. JUSTICE BUTLER. It goes only to the future, I suppose.

MR. BERGE. Yes.

MR. JUSTICE BUTLER. Let me see if I understand your position. You say that this order, having been set aside on the ground on which it was set aside, which I shall say, for short, is that the Secretary did not comply with the statute as to a hearing, argument, and considering the testimony, the Secretary then may take up the matter again and grant a hearing and consider the evidence and make another order, either the one he did make, or increase the old rates, or change it in any way he sees fit to, and make it applicable in the past. Is that your position?

MR. BERGE: I cannot answer that question categorically.

MR. JUSTICE BUTLER. Perhaps my question will enable you to understand what I am trying to find out.

MR. BERGE. I think I understand.

MR. JUSTICE BUTLER. Will you inform me?

MR. BERGE. Our position on that would be that where there had been no rate order ever made——

MR. JUSTICE BUTLER. That is not my question. My question contemplates a rate order in form made and set aside on the grounds on which this one was set aside.

MR. BERGE. Yes.

MR. JUSTICE BUTLER. I am asking you, where do you get power for the Secretary to go back and fix rates between the first of November, 1937, and the commencement of the suit, which was June 14, 1933, if my memory is correct. That is the precise question, and that is the very important question which is presented by your appeal, and which you say will be foreclosed unless you have a stay. I want you to make that perfectly plain to me.

MR. BERGE. Instead of answering the question precisely as you put it, may I state our philosophy, our approach to this thing?

MR. JUSTICE BUTLER. Yes, and after you get through with your philosophy, come to the question.

MR. BERGE. I will try to do it, and try to do it very shortly. But we start out this way, that it was not contemplated by the statute or by Congress that substantive rights should be determined by a procedural slip. We say there must be some way by which the thing can be corrected within the statute, language which is not express as to this sort of situation, but, on the other hand, does not foreclose it. We say that there are several things the Secretary may do. We do not know which one he is going to do. He may undertake to correct the old order, that is, he may grant this hearing, fully hear the exceptions, and then enter an order which is in all terms the same as the old order, and which may be projected either as a validation of the old order, or of the new order. If it is projected as a validation of the old order, I think it could be plausibly argued that under this language which I have read, when there is undoubted jurisdiction, as there was in this case—unquestionably there was jurisdiction of the parties and of the

subject matter—the order would not have been subject to collateral attack, the parties had to abide by it if they were not enjoining it temporarily during the course of the litigation. So that we would say that where there is an order that is voidable rather than void in the sense of the language that was used in the Atlantic Coast Line case, the Florida case, that the Secretary could by according the parties the hearing they had been denied, validate the order. That is one way.

He might issue, after a full hearing, an order that was in some respects different from the old order, correct the findings in some respects after it had been demonstrated to him, after argument, that the old findings were not proper in view of the evidence.

He might make higher or lower rates. We cannot undertake to defend such action until we know whether it is going to be taken. But there might be an order amending or correcting the old order.

On the other hand, perhaps he cannot validate the old order, or might not see fit to do that, might enter a new order as of June 14, 1933. We would say in that case that that is not a retroactive order in the sense in which we think of retroactivity in the case of an ordinary order. It is different from the case where the Secretary would initiate an inquiry to determine whether rates fixed four or five years previously were valid, because such a hearing and an order with respect to a past period would certainly disturb vested rights. Consignors and commission men would have bargained with reference to what they thought to be the true rate, on which they in good faith relied, and to enter such an order is contrary to the policy of the law, and I have no doubt could not be satisfactorily defended, but certainly there is plausible argument for the entry of such an order where it does not disturb vested rights. It does not take anything away from consignors that is now in their pockets, or from commission men. It is not retroactive in the sense that it operates to disturb rights which had been foreclosed.

This money was paid with knowledge that if the rate was 40 cents and the new rate was 35 cents, 5 cents would go into the court, to be held; although the consignors and the commission men knew when the transaction was entered into that the ultimate title to that money was to abide the event, was to be determined after the ultimate fairness and reasonableness of these rates was determined.

MR. JUSTICE BUTLER. Let us get back to the construction of the terms of the deposit.

MR. BERGE. I am setting forth what our argument will be.

MR. JUSTICE BUTLER. You are construing the terms of the deposit to be that they put up security against rates to be made in the future for the safeguarding of fairness.

MR. BERGE. I am trying to state what would be the basis of our argument if this case were fully heard. So we say that the order in practical effect, far from being a retroactive order to disturb vested rights, operates on this fund, and in that sense it is prospective in operation, because it determines to whom this money will be paid.

MR. JUSTICE BUTLER. When you say it operates on the fund, you have to go back again to the conditions upon which the deposits were made, do you not?

MR. BERGE. Yes. I see that your Honor's mind recurs to that question.

MR. JUSTICE BUTLER. I am emphasizing the importance of the question I first asked: On what condition was this money paid into the court? Has the condition been met, has it been complied with?

MR. BERGE. We want a chance to argue as strenuously as we can to the Court that that condition has not been met.

MR. JUSTICE BUTLER. What was the condition? What do you say the condition was on which the money was deposited?

MR. BERGE. The money was deposited until there had been a determination of whether or not the Secretary acted within his power and with reference to the evidence.

MR. JUSTICE BUTLER. Will you tell me the basis of that statement? Surely it is not contained in the order for the deposit which you read.

MR. BERGE. No. I say in the first place that it was undoubtedly in the minds of the parties and that a court of equity should try to project itself into that situation. On the other hand if we are to look deeper than what must have been in the minds of the parties let us look at the language of the decree, which is, "until the termination of this cause", and I think that the legal and technical arguments are absolutely sound that this cause has not terminated until we have had an appeal from this order of distribution. We contend that follows from the language of this Court.

MR. JUSTICE BUTLER. Let me ask you another question. Suppose Mr. Morgan receives his fund pursuant to this order and the Secretary goes on and takes action such as you suggest. Would not Mr. Morgan be liable for the difference just the same as if this money remained in the court?

MR. BERGE. I think that likely he would be liable.

MR. JUSTICE BUTLER. So that so far as legal liability is concerned—I am not considering now multiplicity, and so forth—the order making restitution of the deposits cuts no figure. Am I right?

MR. BERGE. Do I understand your Honor's question to be this, whether or not the money is refunded to the commission men at this time, the Secretary may still go ahead and hold a hearing and make a new order?

MR. JUSTICE BUTLER. That is, the return of the money will not affect his power, nor would it affect the liability of Mr. Morgan to make restitution of collections he has made over and above the rates finally established to be fair, just and reasonable.

MR. BERGE. I think not, although that presents undoubtedly a question. Let me say, without committing myself, that if that return is made, and the appeal——

MR. JUSTICE BUTLER. It would not affect the Secretary's jurisdiction.

MR. BERGE. No; but it might take one of the props out of the argument that this order does not disturb the equities. This is primarily, we think, an equitable situation. Certainly it would be more equitable to have an order operate on the fund rather than to operate on these parties after they got the money back. I suppose that technically it does not disturb the Secretary's power.

MR. JUSTICE BUTLER. Nor does it destroy the liability of the commission men, of the agencies. The restitution of this money to Morgan, we will say, to illustrate, would not affect the Secretary's jurisdiction under the statute at all to do whatever he is empowered to do with the rates in that period of time.

MR. BERGE. There is this trouble——

MR. JUSTICE BUTLER. Just a moment. Nor would it affect the liability of Morgan to serve for reasonable charges, would it?

MR. BERGE. The question of the limitation period, if reparation charges enters, because there is a 90-day limitation period.

MR. JUSTICE BUTLER. Is this a reparation proceeding?

MR. BERGE. Oh, no.

MR. JUSTICE BUTLER. Can the Secretary initiate a reparation proceeding?

MR. BERGE. No; but so long as this money is held in a court, the cause of action in a reparation proceeding presumably does not accrue to the shippers, and once the money is paid out to the shippers—or I should say to the commission men—the limitation period commences to run, and I suppose that if this money is paid to the commission men, the other side would argue that that was now the procedure to determine this question.

If the courts have any control of this situation at all, I should think it would be far preferable to have the ultimate right to this money determined in a suit to enjoin whatever order the Secretary now may make, rather than to have it tested in a multiplicity of reparation suits.

It is argued, I think, that there is no right to reparations here, but we squarely take issue on that, because we think that unless the money goes back to the commission men, the whole question of the right to the money could be determined in many suits, and there would be no doubt thousands of them, claims filed with the Secretary.

MR. JUSTICE BUTLER. You say that Morgan would still be liable to these shippers?

MR. BERGE. In a reparation proceeding.

MR. JUSTICE BUTLER. In some proceeding, even though he got his money back, that the restoration of the fund would not deprive these shippers of their cause of action?

MR. BERGE. Yes, we would say that. Let me call attention to another section of the statute. Your Honor asked me a few moments ago about the provisions with reference to the Secretary's rate-making power. There is another provision. Quite independently of the Secretary's rate-making power, it prohibits the collection of unjust, unreasonable and discriminatory rates, by the provision in section 305, which is quite apart from the Secretary's power. That section provides:

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful."

The District Court has twice held that the rates prescribed by the Secretary in this order were just and reasonable; they adopt his findings as their own.

MR. JUSTICE BUTLER. Was that issue before the District Court?

MR. BERGE. Oh, yes, absolutely.

MR. JUSTICE BUTLER. Whether the rates were just and reasonable?

MR. BERGE. In this way, that they had before them the review of the Secretary's order, and there is Equity Rule 70½, which requires separate findings of the District Court.

MR. JUSTICE BUTLER. Would the District Court have jurisdiction to find that the rates prescribed by the order were too low or too high?

MR. BERGE. Not to substitute its judgment for the Secretary's.

MR. JUSTICE BUTLER. The only issue before it was whether the order was a valid one.

MR. BERGE. The District Court held that the Secretary's order was before it by substantial evidence. It proceeded, albeit erroneously with respect to its jurisdiction, to determine that the rates were supported by the weight of the evidence.

MR. JUSTICE BUTLER. You are not relying on that?

MR. BERGE. Except to this extent: I think that the District Court has the right, in fact the duty, to make separate findings of fact and the District Court in making findings of fact to support its order adopted the Secretary's findings as its own, and expressly reaffirmed certain of them. The total effect is that this District Court has found that the old rates were unjust and unreasonable. I am not contending that the cause of action could be based on that in a separate reparations suit, but I am contending that the fact that the only determination on the merits that has ever been made has been one in support of the Secretary's order is certainly going to give great impetus to independent claims against these commission men, and that the Department of Agriculture is going to be jammed up with these things, and the courts ultimately, on judicial review, and from the standpoint of sound procedure, administrative and judicial, it would be far better to have a determination on the merits in a proceeding in which this hearing point was removed. It is not contrary to the statute, it is exempted from the ordinary principle against retroactivity,

because of the peculiar circumstances in this case, and it can be done without disturbing independent substantive rights without being unfair to anybody. We cannot attempt now, certainly the Court would not do it and Government counsel would not undertake to attempt, to foreclose the form of order the Secretary may enter. Of course theoretically he might enter an order dismissing the proceeding, and there would be nothing more to it.

MR. JUSTICE BUTLER. He might take no action.

MR. BERGE. That is within his power.

MR. JUSTICE BUTLER. And the fund would remain where it is.

MR. BERGE. No, the fund would go back to the commission men.

MR. JUSTICE BUTLER. Let me understand. How long should this fund remain where it is, according to your view?

MR. BERGE. A reasonable time, to permit correction of the error. Let me say, in regard to that, that this order reopening the procedure was entered on the 2nd day of June, and the Secretary allowed 30 days for the taking of exceptions to the order which he served, and he proposed to go right ahead and hold a hearing, and the thing undoubtedly would have been decided this summer. Opposing counsel asked an additional period within which to file the exceptions to the proposed order, and the Secretary granted an extension until August 15. That was at their request. The Secretary has shown every indication of good faith and promptness, and proposes to go right ahead and determine this question as soon as possible. Knowing how those things operate, and the great desire to get this controversy settled, it is a reasonable prognostication that whatever order he enters will be entered in the early fall, probably in the month of September.

MR. JUSTICE BUTLER. It is contemplated that the parties shall have a right to introduce testimony?

MR. BERGE. It is not, but they can request it if they ant to. I think the form of the order of the Secretary aves that door open. He says:

> "It is further ordered that said market agencies, if they file exceptions to said tentative findings of fact, conclusion and order."

MR. JUSTICE BUTLER. What were the tentative findgs of fact, conclusion and order?

MR. BERGE. The same as the order contested.

MR. JUSTICE BUTLER. That is, he now serves what was s final judgment on the facts and the merits of the conoversy upon the parties as tentative to the end that they ay argue before him and call upon him to give the hearg which it was held he did not give. Does it also conmplate that they are free to bring in evidence to show hether they made or lost money during this litigation?

MR. BERGE. That is open to them in this language of e order:

> "In accordance with the rules of practice adopted by the Secretary of Agriculture, governing the procedure in such cases, and within which to make any appropriate motions or objections with respect to further proceedings in this case."

Again, we cannot forecast what his action will be, but im sure I can say that if they make such a motion and the opportunity to introduce additional evidence, the cretary will hear them. We did not invite them to do it. ur Honor is fully familiar with our theory, that the apcation of these orders is not a test of their fairness, that that these specific findings are to be judged with refere to the evidence in the record. There is no confiscation stion which entitles them to a hearing de novo in court.

MR. JUSTICE BUTLER. Assuming the Secretary has jurction, as he claims, would testimony as to the result on ir business be material?

MR. BERGE. I do not think so.

MR. JUSTICE BUTLER. You would object to their introducing evidence?

MR. BERGE. I cannot speak for the Secretary of Agriculture on that, but I think the disposition of the men in the Department of Agriculture, and the Secretary, would be to let them put in anything they wanted to.

MR. JUSTICE BUTLER. But you would say it was immaterial?

MR. BERGE. I would argue that on judicial review.

MR. JUSTICE BUTLER. You would say, let it in, and then regard it as immaterial?

MR. BERGE. I do not know whether the Secretary would regard it as immaterial or material, but I would argue that it was immaterial as a matter of law.

MR. JUSTICE BUTLER. That would be on the ground that the Secretary had ordered rates applicable in the future, and that after a lapse of time the actual experiences could not be substituted for the forecast?

MR. BERGE. No, that would not be the reasoning.

MR. JUSTICE BUTLER. Why do you think it is immaterial, then?

MR. BERGE. Exactly on that question I would say they had the right to do it in a confiscation case. I say it is not material here because I think the principle of market agency rate-making, which this Court has upheld—although I may be wrong—excludes as criteria the number of agencies which may be put out of business.

MR. JUSTICE BUTLER. I was not speaking of that at all: I was taking the case of a single man, say Morgan.

MR. BERGE. I do not think you can tell whether these rates are fair or not by considering whether Morgan makes money. He may make a lot of profit and may not make any: but that goes to the substantive merit of the argument, and the courts are always free to take a different slant on that. I think this Court's decisions in the Acker case and the Corrick case would support my view. I would person-

ally say that new evidence as to the application of the rates to Morgan or to many of them would not cast any helpful light in determining the merits of the case.

In the brief that was filed in this case on the merits there were large tabulations with respect to the application of these rates to different periods, and your Honor will recall that we tried to answer those, and we would make the same argument again, that they did not prove anything. But I think that the Secretary, irrespective of the mistakes he has made in this proceeding, has never denied these parties opportunity at any stage to introduce evidence. One rehearing was granted. The first examiner's hearing lasted for two and a half months, in 1930. The second examiner's hearing lasted a couple of months, in 1932, and the hearing was reopened in 1932 after an order had been entered because they wanted to put in evidence on changed economic conditions. I do not think the Secretary would take any technical view, but we think the defect which this Court found controlling of the old procedure could be adequately corrected by a hearing with reference to the old evidence.

As I understand this Court's reasoning, one of the objections to the procedure was that parties never had an opportunity to be fully apprised of what the order would be, hence they could not intelligently argue to the point because they did not know what was being held against them. We grant them that opportunity. We think that would comply with what your Honors have held to be the controlling authority here. But the door is open for the making of appropriate motions, the taking of new evidence, or anything else.

Certainly we cannot forecast error on the part of the Secretary in denying any such motion. We may assume he will act fairly on it, and if he improperly denies the motion—and I think he is going to be careful the next time—if he improperly denies the motion, that would invalidate the proceeding. We cannot forecast or assume that there will be error again, nor can we forecast the precise form

of order he will enter. We think there ought to be, and it is consistent with the statute that there is, a means for correcting an anomalous situation like this. We do not think that Congress ever intended or that the courts like this sort of result, whereby the title to $600,000 in money is determined by a fortuitous slip, a serious one, no doubt, but one where the trouble can be corrected without doing anybody any harm. If we are wrong in that, the Supreme Court can determine it, and we will have a guide for future action, administrative or legislative.

This appeal can be heard early this fall. The Government will be willing to expedite it, willing to have it put on at the fore part of the session, if the Court desires. The Secretary has moved promptly. This money has been there for five years; and the payers are not having to pay any more in. There are substantive questions of public interest, and even though we are wrong on the merits, let us have a decision of the Court that will conclude this question, a question on which, for sufficient reasons, it was felt the record was inadequate to conclude when we petition for rehearing.

We moved promptly, and this appeal is on the way.

MR. JUSTICE BUTLER. You applied for a stay to the statutory court?

MR. BERGE. Yes. They turned us down. They allowed the appeal, and denied our stay, and that is why we are here.

MR. JUSTICE BUTLER. On what ground did they deny it?

MR. BERGE. I do not think anything was stated.

MR. JUSTICE BUTLER. Did they file a memorandum?

MR. BERGE. I do not think so.

MR. JUSTICE BUTLER. Does not your petition contain their memorandum?

MR. BERGE. Yes, it does, but I could not recall what they said, at the time your Honor asked me.

MR. JUSTICE BUTLER. What ground do they give?

MR. BERGE. I have the language here.

MR. JUSTICE BUTLER. They heard you?

MR. BERGE. This is what happened. We had an argument at Kansas City on June 11, just eleven days after the decision, on the motions with respect to distribution. We had moved to stay and the other side had moved for distribution, and I went out and argued that. The court took it under advisement. About two weeks later they rendered their decision against us, and entered their order for distribution, from which we are appealing. We immediately wired the United States Attorney and asked him to apply for a stay. We did not have much time. None of us went out. The United States Attorney went in and applied for a stay. I am unable to say what arguments were made. I do not know as to the fullness of the argument, but of course the District Court was by that time fully apprised of our situation and the argument in support of the application for stay would no doubt have been substantially the same as the argument I had made in opposing the distribution. But we just got a reply that the stay had been denied, and the court signed the order allowing the appeal.

MR. JUSTICE BUTLER. I wanted their reasons.

MR. BERGE. All I can give you on that is this order, in which, after making the recitals——

MR. JUSTICE BUTLER. I thought they had a separate opinion.

MR. BERGE. There is an opinion, but that opinion was delivered at the time the order of distribution was entered.

MR. JUSTICE BUTLER. No, I mean an opinion on the stay. Was there an opinion on the denial of the stay?

MR. BERGE. No. The opinion your Honor has in mind was the opinion they rendered when they entered the order of distribution, and before we had asked for a stay. If there was an opinion, we have never received it; but I am quite sure there was not.

MR. JUSTICE BUTLER. I have before me a document starting in this way:

"Per Curiam.

"The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution."

That is the document to which I referred.

"These matters arise in the manner now to be stated."

MR. BERGE. That, your Honor, is the opinion that was rendered when the court entered the order from which we are appealing, the order of distribution. That was about June 18, when they handed down the memorandum opinion, and denied our motion.

I see what is troubling your Honor. The language is confusing. We call our motion that was argued a motion for a stay of distribution of the funds. The other side called its motion a motion for immediate distribution. Those two motions were put up to the court and this opinion was the result. It is an opinion and an order ordering the distribution. We applied for a stay of the order ordering distribution. The confusing thing is that we called our motion at that time a motion for stay of distribution. The thing which was denied subsequently was a motion for stay pending appeal.

MR. JUSTICE BUTLER. You made a motion for stay after the appeal and pending the appeal.

MR. BERGE. We asked the United States Attorney to.

MR. JUSTICE BUTLER. What is there here in the record, what is in this Court now, what has been filed in this Court? Was the case brought here and docketed?

MR. BERGE. It is on the way up.

MR. JUSTICE BUTLER. Why have you not filed your papers in this Court so as to show what is before it?

MR. BERGE. The record has not come up, and the District Court has not the record here yet, but we understand

that is not a requisite. We have filed copies of all the appeal papers with the Clerk. We have filed with you the petition for an order.

MR. JUSTICE BUTLER. You have filed your appeal in this Court. Have you filed anything in the Clerk's office here?

MR. BERGE. We have filed these motion papers.

MR. JUSTICE BUTLER. You regarded these motion papers as addressed to the Court, apparently.

MR. BERGE. Yes, and we are willing to amend that. We did not understand they had to be addressed personally to you. We had addressed them to the Court, and we made these informal arrangements to present the matter to you. We will amend the papers so as to address you.

MR. JUSTICE BUTLER. I may be wrong, but as I understand it, the District Court had power to stay the order superseding.

MR. BERGE. Oh, yes.

MR. JUSTICE BUTLER. As I understand it, any Justice of this Court has.

MR. BERGE. Yes.

MR. JUSTICE BUTLER. And as I understand it, this Court has.

MR. BERGE. That is our understanding.

MR. JUSTICE BUTLER. This Court is not in session, and I happen to be the Justice for that circuit; and I assume I have the power. I prefer not to exert the power until the papers are filed, so that we may know what the decree assailed is, and all the proceedings underlying that. They should be filed with the Court. Then you come to me for the application, and I will hear you. My action is not final. If I deny your application, you can go elsewhere.

MR. BERGE. I may say, in respect to that, that the time when the appeal is docketed is not in the appellants' control, at least that has been my experience in the making up of the record by the District Court. It is summer time, and those things proceed slowly. There should not be a

long record, and we are doing everything we can to expedite it. But my experience in these other cases we brought up has shown that we have to wait on the District Court. I do not know how soon this appeal may be docketed. We will do everything we can to expedite it. But I suppose there is no way to file our appeal until the record comes up. We will exert every effort to get it here promptly.

Then do I understand that there could be no action on this application until the record is here?

MR. JUSTICE BUTLER. I have not so ruled.

MR. BERGE. I just wanted to be sure.

MR. JUSTICE BUTLER. I want to emphasize that I very much prefer that the papers be filed before I pass upon the question.

MR. BERGE. Let me ask this. The District Court entered this order denying our stay on the 30th of June. We were advised informally that they would give us a reasonable time in which to seek this hearing before you.

MR. JUSTICE BUTLER. You told me that, when you called me up, and I asked you if there was any urgency about it.

MR. BERGE. We had informal assurance and we were confident that they would not act in the interim. But could some kind of an order be entered staying the action until the appeal papers get here? I presume we could again get some sort of informal assurance.

MR. JUSTICE BUTLER. We will hear what the other side have to say about it.

MR. BERGE. Would your Honor care to hear this order denying the stay?

MR. JUSTICE BUTLER. Yes.

MR. BERGE. They say:

> "And whereas, on this the 30th day of June, 1938, said petition has been duly presented by counsel for appellants and counsel for appellees have appeared in opposition thereto and this Court has heard arguments of counsel for appellants in sup-

port of said petition and arguments of counsel for appellees against the sustaining of the same and the Court being fully advised in the premises; and having duly considered appellants' petition, finds that appellants' petition is without merit and should be overruled;

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said petition of the appellants be and the same is hereby overruled and exception is allowed appellants."

MR. JUSTICE BUTLER. Two things have troubled me very much about this. The first is to find the condition under which the money was put in court, and the second is what has happened since with reference to the staying of proceedings pending appeal.

MR. BERGE. All they do is recite the application for the stay and deny it.

MR. JUSTICE BUTLER. They went into the merits of it and said there was no merit in your opposition to the distribution of the funds.

MR. BERGE. Yes, but that is the order from which we are appealing.

I may say just this, I notice in the memorandum filed this morning, which I have not had time to read, the memorandum of our opponents—

MR. JUSTICE BUTLER. I have not seen any memorandum.

MR. BERGE. It was just handed to me.

MR. JUSTICE BUTLER. I thought I had one from you. By the way, under what section of the Judicial Code is this appeal taken? You say the absolute right is given for the appeal by the Code, and so forth, but you refrain from citing the section. I should like to have you read the language.

MR. BERGE. May we find that while our opponents are arguing?

MR. JUSTICE BUTLER. Yes. It is the appeal from the order in the main suit.

MR. BERGE. We say that it is the same section applying to the case of Baltimore & Ohio Railroad against the United States, in which your Honor wrote the opinion, reported in 279 United States Reports, and that that is conclusive as to our right.

MR. JUSTICE BUTLER. I thought you perhaps relied on that, but there was nothing I found in your memorandum to indicate it.

MR. BERGE. I am sorry. We have our statement of jurisdiction under Rule 12, of which we filed a copy with the Clerk, which we hoped would be given you.

MR. JUSTICE BUTLER. What does it cite?

MR. BERGE. It cites the Baltimore & Ohio case, and one or two other cases. Our primary reliance is on the Baltimore & Ohio case, and I presume your recollection is fresh on that and it is not necessary to go into it. We think that is conclusive. I read the last sentence in the decision of the Court on the petition for a rehearing:

> "What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide."

We think it is implicit in that that there must be an appeal from the decision of the District Court.

MR. JUSTICE BUTLER. Some rulings of the District Court are final in some cases.

MR. BERGE. Yes, but here is a case——

MR. JUSTICE BUTLER. I am not saying this is one. I was just drawing attention to the scope of that statement.

MR. BERGE. This is a case where it seems to us the court refused to pass on that question because the record

was inadequate, and it is a final order, I think, in the sense that it is appealable, and certainly it is the order which goes to the heart of the whole matter in litigation, as to who gets the money.

MR. JUSTICE BUTLER. I do not see that at all, that it goes to the whole heart of the litigation. I have understood you to say here this morning that the jurisdiction of the Secretary is not affected by the order of restitution, nor would the liability of the agencies be affected. You suggest with much emphasis, and I will say with great force, that nevertheless it ought to be stayed; but to say that it goes to the heart of the question I think is overstating your own position.

MR. BERGE. Let me suggest it this way, that this Court in the last paragraph of the opinion of May 31st, declined to pass on the question of who should get the money.

MR. JUSTICE BUTLER. That question was not here.

MR. BERGE. That is correct, but you added that that was a question for the District Court to determine.

MR. JUSTICE BUTLER. That was in the hope that you would understand it.

MR. BERGE. I hoped we had.

MR. JUSTICE BUTLER. We said it was not for us, in the hope that you would understand it and take it to the court below; but to build any case upon that statement is futile.

MR. BERGE. We are not building on that.

MR. JUSTICE BUTLER. To use the forcible language of the Chief Justice, that would be idle.

MR. BERGE. I hope I have made clear that we are not building it on that alone, but we do think this Court contemplated the possibility that the Secretary may take action, and because of all of that, this is a decree of the District Court entered in this proceeding, and before the cause is terminated we ought to have our right to argue our appeal, and it is only just and fair that the money be held pending the final disposition of the case.

Argument of Mr. Thomas T. Cooke, on Behalf of the Appellees

MR. COOKE. At the outset I will give your Honor a copy of our memorandum, which contains a copy of the opinion of the lower court.

MR. JUSTICE BUTLER. You are appearing for whom?

MR. COOKE. I am appearing for the market agencies. It is our position that what the Secretary proposes to do, or may do, has nothing to do with the release of these impounded funds, and that the terms of the temporary restraining order are, as the lower court said, susceptible of no other interpretation than that the funds should be released, as they were released by the order of the court which it refused to stay.

The terms of the temporary restraining order, except for the proviso, have not been read to your Honor, and with your permission I should like to read them. I read from page 127 of the record in the Supreme Court on the main appeal, in which the temporary restraining order filed July 22, 1933, was printed. In the third paragraph it says:

> "That petitioner has an established business as a market agency, registered under the Packers and Stockyards Act, 1921, engaged in the sale and purchase of livestock for others at the Kansas City Stock Yards, in Kansas City, Missouri, and that if such temporary restraining and stay order suspending the enforcement of said Order of the Secretary of Agriculture"—

That is, the June 14, 1933 order—

> "is not granted, the defendants will, before the hearing upon the application for temporary injunction as prayed in said Petition"—

That is, the petition to set aside—

> "have it within their power, and they will, proceed to enforce the penalties provided for violation of said Order by the Packers and Stockyards Act, 1921, and will institute a multiplicity of suits against the petitioner on each of the grounds of supposed violation aforesaid and otherwise proceed in derogation of the right of the petitioner to collect rates and charges for stockyard services rendered under the Schedule of Rates and Charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said Order the petitioner would be unable to collect from the users of its service the differences between the rates fixed by the said Order of the Secretary and the rates prescribed in the Schedule of Rates and Charges now on file with the Secretary of Agriculture. In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner, causing it loss from day to day in the State of Missouri, and plaintiff would be irreparably deprived thereof in violation of the Fifth Amendment of the Constitution of the United States."

I have read all the parts of that order except the proviso, which has been read, which have any bearing on the purpose for which these funds were deposited. The lower court said:

> "The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation."

The phrase to which your Honor has called attention, and which my learned opponent construed as meaning that the Secretary shall have an opportunity to make a new order, is "dependent on the outcome of the cause", or words to that effect. "The cause" can be only one thing. The cause is the cause we brought to set aside the order of the Secretary. When that order is set aside, it is very plain that the cause is terminated. It is also very plain, under the terms of this order as I read them, that under no condition, as your Honor has suggested, can these funds be turned over to the consignors or the shippers. They are deposited as security that the commission men will make restitution in the event they should lose.

Before taking up a brief chronological statement or history of these rates, and so forth, I should like to say that we do not feel the same way the Government does about this stay doing us no harm. After all, the interest at 6 per cent. on $600,000 is $3,000 a month. We have been deprived of these funds for five years, or such of them as were impounded from time to time. During that time one-third of the market agencies have gone out of business. In this record in the Supreme Court affidavits were filed to the effect that inability to get at these funds drove quite a few of these agencies out of business. So that we feel that a good deal depends upon whether or not a stay is granted.

Secondly, as your Honor has well suggested, the determination of any great administrative question has nothing to do with the distribution of these funds. That can be determined, if there is such a question, whether or not these funds are distributed.

Counsel has spoken about the lower court finding that the rates were reasonable as fixed by the Secretary.

MR. JUSTICE BUTLER. You need not trouble about that. That question was not before the lower court, and if they said anything about it, it was obiter, and you need not regard it.

MR. COOKE. Very well. Coming back to the temporary restraining order—and, as I have said, we feel the whole thing depends on that, that what the Secretary proposes to do is not properly a matter in this record—of course, the statutory court has no control over what the Secretary does. What the Secretary proposes to do in making a nunc pro tunc order the lower court says has no shred of reason to support it; yet as a court, as a judicial agency, they cannot direct the Secretary in any way. I understand that has been universally the Government's contention, that their power is only a revisory power.

Three cases are relied upon by the Government in their jurisdictional statement. One is the Morgan case.

MR. JUSTICE BUTLER. That is, on the question as to whether it is appealable?

MR. COOKE. Yes. We take the position that it is not appealable, that the Supreme Court has no jurisdiction. Secondly, that the questions raised are utterly frivolous.

MR. JUSTICE BUTLER. Put that question aside, the question of whether they are frivolous of not. The question of appealability will be argued.

MR. COOKE. That is what I am going to talk about. They rely upon three cases. One is the Morgan case, and, as your Honor has just said, the short expression of opinion upon the denial of the petition for rehearing can have no bearing on that.

MR. JUSTICE BUTLER. That has no bearing. The denial of the petition for rehearing in the Morgan case has no bearing on the question, in my judgment. So you need not trouble yourself about it. What did the mandate require?

MR. COOKE. The mandate required that the lower court take proceedings in conformity with this opinion.

MR. JUSTICE BUTLER. Why does not the Baltimore & Ohio case construction of the statute governing appeals from three-judge courts apply here? I will put it this way: is it perfectly plain and obvious that it does not?

MR. COOKE. I think it is, for these reasons. Your Honor in that case mentioned three reasons why that order was appealable. Of course, what happened was that the case went back to the statutory court upon a reversal. The statutory court had held that the east side roads had to absorb, as I remember, the charges across the Mississippi River from East St. Louis to St. Louis, which was in favor of the west side roads, and the Supreme Court reversed. When the case came back to the statutory court they refused to allow restitution in favor of the east side roads. The Court, speaking through your Honor, said that the case was appealable, and gave three reasons. The first of those reasons, as I understand, was that the order compelling the west side roads to make restitution to the east side roads amounted to a decree at the end of an equity suit. We think that our order releasing these funds, from which the Government appeals, has no such characteristic. We think it is a simple order of court, or a direction to the clerk to release these funds, that upon the decree of the lower court coming down permanently enjoining the Secretary from enforcing his order, declaring it null and void in accordance with the mandate of the Supreme Court, we became automatically entitled to these funds which we had deposited as security, although doubtless the clerk would not release them without an instruction from the court; but we feel that the so-called order of the court is nothing more than an instruction to the clerk, particularly in view of the fact that the temporary restraining order, pursuant to which these funds were impounded, is not in the least ambiguous or susceptible to any construction under which the consignors could ever get these funds.

Therefore we say that this order is not at all equivalent to an order compelling one of the parties to make restitution to the other party. We feel it is an order of which they did not even have to have notice, that it is an ex parte order to which we automatically become entitled.

The second basis of the holding in the Baltimore & Ohio case as I understand it is that if the lower court did not carry out the mandate of the Supreme Court—and it did not in that case, because the reversal, as your Honor says, in the opinion, necessarily carried with it right to restitution—either appeal or a mandamus would lie to the Supreme Court.

In our case we feel that if the Court should refuse this order of release, releasing these funds, they would be acting directly contrary to the mandate of the Supreme Court, and not in conformity with it. So that the second reason does not apply.

The third reason was that the restitution proceedings were an incident of the main proceeding. In our case it seems to me that much the same reasoning applies to dispose of that as I mentioned as disposing of the second reason, that is, that this is an automatic release to which we are entitled, and to hold these funds awaiting an order of the Secretary cannot possibly be an incident of the main suit. It is contrary to the purpose of the main suit, which was to set aside the Secretary's order, and get back these funds which we deposited as security. That, I think, disposes of the Baltimore & Ohio case.

There is only one other case they mentioned, and that is a very complicated set of facts in the Atlantic Coast Line against Florida case, also mentioned in the cases they put in their jurisdictional statement as those on which they rely.

I do not think I ought to take your Honor's time—I have discussed it in the memorandum—to discuss the very complicated facts in that case, in which the Court split five to four, but as suggested in our memorandum very clearly, if the case has any bearing at all, which I very much doubt, taking either the majority opinion or the dissenting opinion, there is nothing in them which in any way aids the Government's contentions.

There are a couple of things which I should like to say about that case. For instance, Mr. Justice Cardozo in the

majority opinion mentioned the fact that it is not even contended—and this bears on something about which your Honor inquired—that between the time when the first order was made in that case, which the Supreme Court held invalid for lack of basic findings of discrimination, and the second order, which, by the way, was made upon new evidence and new findings by the Interstate Commerce Commission, that it was not even claimed that there had been any change in conditions.

I hardly think my friends will claim that there was no change in conditions during the years 1933 through 1937 which would make an order entered on the 14th of June, 1933, this *nunc pro tunc* order which the Secretary proposes to make—that would make it effective to award reparations, which he admits he is trying to do, for that period of five years. Certainly your Honor will take judicial notice of the fact that livestock prices varied greatly during that period, that the efforts of the administration were to raise prices, and the consequence is that that does not apply to this case at all.

In the Atlantic Coast Line against Florida case the majority found that the intrastate rates set by the Florida commission were confiscatory. In other words the Interstate Commerce Commission in that case forced the railroad to collect higher rates. They had to comply with the order, which was sustained by the statutory court, and Justice Cardozo, speaking for the majority, expressed the opinion that whatever the legal rights were, the equities were against compelling the railroad to disgorge and Mr. Justice Roberts, writing the dissenting opinion, felt that because the order was entirely invalid during the period, they should restore the moneys they had collected during the period when the order had been presumably in force. So much for the cases cited by the Government, none of which I think has any bearing at all upon the present situation.

I assume that the Government takes the position that as a matter of right they were entitled to a stay of the dis-

tribution of these funds, because it does not make any difference which side of the picture you look at, the denial of their application for a stay or the granting of our motion for a release amount to the same thing. The Government has not appealed from the denial of their motion for a stay, evidently realizing that they could not possibly claim this as a matter of right, that it must be at the most discretionary. In their jurisdictional statement they have nowhere stated any grounds of abuse of discretion, if it was a discretionary matter instead of a mere ministerial act by the court.

I do not know whether I can clear up a matter inquired into by your Honor, but what happened, first, in the statutory court, after the mandate came down and the decree was entered on the mandate permanently enjoining the Secretary, was that the Government by petition applied for a stay of distribution, and we made our counter motion for release, and the court's opinion, the per curiam opinion, which your Honor has read, is directed to both those motions. It says at the end that it disposes of both of them.

The Government had their appeal allowed. They filed appeal papers below, and they had their appeal allowed, and they again applied for a stay of the operation and effect of this order of the statutory court granting our motion to release the funds and the supersedeas.

I do not conceive that a supersedeas would do them any good, because it seems to me it is just like a situation where a court refuses a temporary injunction. There is nothing to supersede. This is not a decree or a judgment upon which execution issues, which execution can be stayed. I conceive that what they really want is a stay injunction, and not a mere stay of the operation and effect of this order. I may be wrong about this, but if the operation and effect of the order were stayed, I do not know how they could appeal from it.

It seems to me that the whole case, therefore, rests upon the terms of this temporary restraining order and the lack

of appealability. They assimulate it to a final order or decree under sections 44 and 47-a of the Judiciary Act.

Passing on to what I think is immaterial and I think is not properly part of this record, what the Secretary proposes to do, that seems to me to be a very strange thing he proposes to do. The day after the Supreme Court denied his petition for rehearing—and I assume he had not been reading the record prior to that—he served us with tentative findings and with an order reopening the proceeding, which order is annexed to the petition for the stay below. These tentative findings of fact are issued as of June 14, 1933. They are in precisely the same form as the findings, conclusion and order which the Supreme Court held to be wholly invalid as the result of fatally defective hearings, because of private consultations with subordinates, among them the prosecutors in the case, and because of lack of notice to the market agencies of the claims of the Government.

Counsel has spoken of his idea that the Secretary will allow us to introduce new evidence and your Honor suggested that, I take it, in connection with the obvious conclusion that this is a reparation proceeding, although no petitions for reparations are claimed to have been filed, and the statutory limitation is 90 days.

MR. JUSTICE BUTLER. The other side does not claim this to be a reparation proceeding.

MR. COOKE. Yes.

MR. JUSTICE BUTLER. I mean orally. Mr. Berge said it was not a reparation proceeding, and that the Secretary had no jurisdiction to initiate one, as I understood it.

MR. COOKE. But in writing he claims that it amounts to the same thing. He says on page 9 of his memorandum——

MR. JUSTICE BUTLER. I ignore the writing and take him on his statement here, so you need not spend time on that.

MR. COOKE. What I am saying is that the attempt is to award impounded funds to consignors which have been impounded between June 14, 1933, and November 1, 1937.

MR. JUSTICE BUTLER. Is not this the attempt, upon being informed that the Court held there was a lack of the statutory hearing required, the Secretary thereupon prepared the document to which you have just referred as of the date of his original finding, and served on the other side that which should be termed his final findings of fact and order, to be tentative, to the end that you could now have the hearing which the Court said you did not have, and there is language in some of the papers submitted on this application by the Government to the effect that he may make an order now, after hearing argument and considering the evidence, nunc pro tunc, that is to say, to have the same effect as if it had been made in the first place. With the greatest hesitation I say that is what they are telling us here today that they are considering doing.

MR. COOKE. Oh, yes, that is right.

MR. JUSTICE BUTLER. So it is not a proceeding for restitution. Then they say that even though restitution were made, he would still have jurisdiction to do the same thing, and that each of the depositors now claimant for the fund would be unaffected as to liability by it, but they add that the situation is such there would be these funds made up of innumerable transactions, and that would involve a lot of suits or applications. I think he said it would glut the department. Evidently there would be a good many claims if that thing were held valid. So does it not get down really, in the last analysis, to this: First, is this an appealable order? You say it is not: they say it is. I think it is not clear, and I will not decide that it is not appealable. I will assume that it is, for the purpose of the argument.

I will assume, further, that the Secretary's jurisdiction would not be affected by the restitution, and that the liability of Morgan and the other claimants would not be

affected, and that gets to the narrow question of whether these contentions are so slim that in passing on an application for a stay I should so say, and deny it. Your argument against that is that this is a lot of money, and that the interest on it is so much.

MR. COOKE. They did not offer to give a bond.

MR. JUSTICE BUTLER. It is divided among 50 or 60 people, is it not?

MR. COOKE. Yes.

MR. JUSTICE BUTLER. They are very emphatic in their idea that there is presented here a great question upon which the Court ought to pass. I think they have failed to make out that if I deny the application, I am passing upon that question.

MR. BERGE. I want to say just a word about that later. I have one more thought on that.

MR. JUSTICE BUTLER. Narrowed down to that, I will hear you further, Mr. Cooke. There is no use talking about things about which agreement is pretty well reached.

MR. COOKE. The court below, as perhaps your Honor has noticed, stated:

> "We consider that the motion of defendants has not the faintest shadow of merit."

They further say that they would consider it an act of bad faith not to restore these funds which were impounded upon the express understanding that they should be released dependent upon the issue of this cause.

> "We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it. It is directly opposed to the very words of the Act autho-

rizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed 'after full hearing' (and there has been no such hearing), and that when they have been so determined and prescribed they shall 'be thereafter observed.' "

On the Secretary's theory, where is he now? He has served us with tentative findings—that is, assuming he could reopen this proceeding—and a proposed order. He is in the middle of the proceeding. He may make an order some time in the year 1938 let us say. He wants to take that back to June 14, 1933. The statute says he can only make an order after a full hearing. Surely the hearing is not complete at a time when he has just served us with tentative findings of fact. Surely it was not complied with five years before this time, that is, June 1 of this year, and surely the rates he will fix as a result of any order he may make nunc pro tunc as of that date are not rates thereafter to be observed.

In other words he is trying to award reparations. I must come back to that because it seems perfectly clear to me he is not proceeding under the reparation sections, because no reparation petitions have been filed, and he cannot act on his own motion, but he is trying to do the same thing by a nunc pro tunc order which is expressly in the teeth of the statute, because the order can only be made after a full hearing.

If the claimants should resort to reparation proceedings, assuming that their claims are not barred, as they clearly all are, because six months has elapsed since these rates were superseded, in November, 1937, and I have never heard that any reparation claims have been filed; assuming he could award reparations, as the public representative, as the Government says, of the shippers, of course he would

have to take into account the reasonableness of these rates we were charging at the time of the particular transactions in which reparations are claimed. Those are tort claims, of course. What they are trying to do is to hold this money as security for tort claims which may be established after the Secretary has issued an order which is *prima facie* evidence in the courts, and then to go into the courts, before juries, and even in this matter, as I understand it, they cannot go into a statutory court which has no jurisdiction to make awards for the payment of money. In other words, they are just trying to get around the reparations provisions.

There is one other thing I wish to say. These rates of ours were set on May 11, 1932. They were filed with the Secretary on that date, and he reduced the rates on June 14, 1933, and it is the difference between these two that has been impounded. We pleaded in our petition to set aside—and I am now referring to the doctrine in the Arizona grocery case—that these rates were 10 per cent lower than the rates fixed by the Secretary in 1923, and which we had been observing ever since, and they expressly admitted in their answer that that was so, and that we had fixed our rates within the maximum of the rates fixed by the Secretary in 1923. Yet in the face of the Arizona grocery case, which holds that no reparation can be awarded under such circumstances, they are attempting, to my mind, to do precisely that by this device of a nunc pro tunc order in the teeth of the statute.

Further Argument by Mr. Wendel Berge

MR. BERGE. Your Honor, may I say just a word?

MR. JUSTICE BUTLER. Yes.

MR. BERGE. In my other argument I admitted, and I think correctly, that this does not affect the power of the Secretary to proceed with the proceedings undertaken, but I do wish to focus attention on this difference, that while

that may be true, it does at the same time make this appeal moot; I mean, there is a difference between the power of the Secretary to proceed and enter a new order which may be challenged in the new proceeding, on the one hand, and on the other hand our appeal, which involves an order for the distribution of money.

It is true that the Secretary could go right ahead with his proceeding and there is nothing to stop him until its enforcement is enjoined by a court, irrespective of how this appeal is determined, irrespective of whether you now grant a stay, irrespective of whether finally you uphold or set aside the order of the District Court. But that is one thing. Another thing is that this is an appeal from an order of distribution which we think comes right within the Baltimore & Ohio case. Since the order itself from which we are appealing affects the impounded funds, if the funds are distributed undoubtedly our opponents would contend that the appeal was moot, and we would have a difficult time in meeting that.

We say that in the Baltimore & Ohio case it happened that after holding that this Court had jurisdiction to entertain the appeal, this Court then reversed the lower court. But it may well be that here we are wrong on the merits, and that this Court might finally affirm the lower court. But whether we are right on the merits or not, whether the District Court erred or was correct, in entering that order of distribution, that does not affect the jurisdiction on the appeal.

Suppose that in the Baltimore & Ohio case you had heard the appeal and then upheld the order of the District Court. The decision on the merits does not affect the jurisdiction to entertain the appeal, and I think that clearly we are within the holding in the Baltimore & Ohio case.

In that opinion it was stated:

> "It is well understood that this court has power to do all that is necessary to give effect to its judgments. The Act authorizes this appeal.

> "Moreover, the proceeding below out of which this denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. * * * The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first."

You there held with appellants on the merits, but certainly what was said here equally applies to the dispute which has arisen with respect to this District Court.

MR. JUSTICE BUTLER. Assume it is appealable.

MR. BERGE. That being so, the purpose of the appeal clearly fails if the money is disbursed meanwhile, because it is an appeal from an order of distribution.

MR. JUSTICE BUTLER. That has nothing to do with the Secretary's proposed action.

MR. BERGE. That is correct.

MR. JUSTICE BUTLER. So that does not involve at all the "big question" you were talking about.

MR. BERGE. It does not. I want to emphasize the difference. A failure to grant our stay would not affect the power of the Secretary to proceed, but it would affect this particular appeal. If we have not impressed your Honor with the merits of our appeal——

MR. JUSTICE BUTLER. Has your appeal any merit at all unless there is some action to be taken by the Secretary? How can it have any merit unless it is the great question which has been suggested by counsel here, by Mr. Arnold, and by the Solicitor General, and by others? Unless he can come in and make the order, what do you want with the nunc pro tunc order?

MR. BERGE. That may be or may not be the kind of order he will make.

MR. JUSTICE BUTLER. But this is no possible case for ıe application of the doctrine of nunc pro tunc. That is ıe entry of an order now which should have been made ıen. This Court has held that that order should not have een made then.

MR. BERGE. There could be a new order entered effective s of that date.

MR. JUSTICE BUTLER. Your position is that, having ıitiated the proceeding in 1930——

MR. BERGE. Originally.

MR. JUSTICE BUTLER. And having gotten around in 933 to making an order, and then five years later it is djudged invalid, with his only power to make an order ffecting rates thereafter to be applied—your position is hat he can in some fashion, in this step here, make an order ow which will be read to have applied to this period, and hat is the only ground you have for this appeal, is it not?

MR. BERGE. The merit of our appeal I think rests on a letermination of that question.

MR. JUSTICE BUTLER. Of that question, and that ques- ion only, is it not?

MR. BERGE. I think, stated broadly, that is correct. That s the question involving the merit of the appeal, and I have tated it to you this morning because we felt that it was ıecessary that we advise you what the questions would be.

MR. JUSTICE BUTLER. You do not in reality disagree t all with the construction of the Court below as to the ondition on which this deposit was made, do you?

MR. BERGE. I think we do.

MR. JUSTICE BUTLER. Mr. Cooke read it.

MR. BERGE. I think we disagree, your Honor.

MR. JUSTICE BUTLER. In what respect?

MR. BERGE. Shall I go over the ground?

MR. JUSTICE BUTLER. That court stated that the under- tanding was that these deposits were made to the end that the order were sustained the rate payers would get the

difference, that it would be returned. That is the substance of their ruling, is it not?

MR. BERGE. Except——

MR. JUSTICE BUTLER. And that is always intended in connection with such deposits in railroad cases and gas cases and so on.

MR. BERGE. Except that we contend that the money was to be held until the cause was terminated.

MR. JUSTICE BUTLER. Has not the cause been terminated? This was a suit to set aside an order which was invalid on the ground that the Secretary did not give a hearing. We held that he did not give a hearing and commanded the lower court to reverse its judgment and set aside the order. That is the situation, is it not?

MR. BERGE. We think it is more than that, your Honor.

MR. JUSTICE BUTLER. What more to it can there be than that?

MR. BERGE. We think that was one of the grounds but we think it was contemplated that there should be a determination in the proceeding whether the rates were substantially fair.

MR. JUSTICE BUTLER. Let me be sure that I understand what you are saying. You contend that in the suit brought by Morgan and the other agencies the issue of reasonableness was to be decided by the court?

MR. BERGE. No.

MR. JUSTICE BUTLER. Then I misunderstood you.

MR. BERGE. The issue was whether or not the rates were arbitrary and without evidence to support them. That is perhaps stated conversely.

MR. JUSTICE BUTLER. Whether the order was made in accordance with law was the only question, was it not? But that is a question of law, whether there was a hearing.

MR. ARNOLD. May I make a statement, your Honor?

MR. JUSTICE BUTLER. Yes. I want you to make one. You emphasized the importance of this question.

MR. ARNOLD. I think the question is whether a procedural defect in the order has the result of terminating the cause. I would make the analogy, for instance, of a judgment given by a lower court and an amendment—this is not a close analogy, and I am not citing it as an authority, but we will get the picture—an amendment of pleadings to conform to proof or an amendment of a judgment to conform to proof. It seems to me that the great procedural principle, in which, among other things, I am interested, is whether an admittedly procedural defect, which can be corrected without any injustice to the parties, should have a jurisdictional effect on the order, and I would say that whether you call it nunc pro tunc—and I would agree that possibly that phrase is unfortunate—or whether you call it an amendment of something which has substance and validity—

MR. JUSTICE BUTLER. What do you mean by "jurisdiction" as distinguished from "procedure"? I will be more specific. The Secretary had jurisdiction to bring on an investigation, and he did it. Did he have jurisdiction to make an order without evidence?

MR. ARNOLD. I think he had no jurisdiction to make an order without evidence.

MR. JUSTICE BUTLER. Let me ask you a question following that. There having been evidence, did he have jurisdiction to make an order without considering it?

MR. ARNOLD. I think—

MR. JUSTICE BUTLER. Jurisdiction now.

MR. ARNOLD. Without considering it?

MR. JUSTICE BUTLER. Yes.

MR. ARNOLD. I think that a court having the power—

MR. JUSTICE BUTLER. Are you not creeping up a little on your own argument when you distinguish between that which is procedural and that which is jurisdictional? We want jurisdiction to do what? Did he have jurisdiction to make the order?

MR. ARNOLD. Yes.

MR. JUSTICE BUTLER. Without reading the evidence?

MR. ARNOLD. He had jurisdiction to make any kind of a snap judgment, and that is a procedural defect.

MR. JUSTICE BUTLER. So it is the position of the department that to proceed without paying any attention to the evidence, reading it or considering it at all, is not a jurisdictional defect. He has jurisdiction to make the order, but it is merely a "slip", I think you called it.

MR. ARNOLD. "Jurisdiction" is a loose term. The order is valid on collateral attack.

MR. JUSTICE BUTLER. We have nothing to do with collateral attacks. I think your jurisdictional argument, as far as I can follow it, comes to this, that having jurisdiction to bring on the investigation, and having brought it on, and having appointed an examiner, who heard the evidence, then he had jurisdiction to decide the case without looking at the evidence or hearing argument upon it.

MR. ARNOLD. In a sense, his order would be valid against collateral attack.

MR. JUSTICE BUTLER. There is no collateral attack question here.

MR. ARNOLD. There is none here.

MR. JUSTICE BUTLER. No.

MR. ARNOLD. I would say the question in which we are interested, and which we think is most important, is that we consider this particular defect before us now—not having read the record—a procedural defect, and it is certainly procedural because it deals with the method of argument—which should be corrected, if it can be corrected without injustice.

MR. JUSTICE BUTLER. So is the failure to serve a summons a procedural defect, too.

MR. BERGE. I would just suggest, in closing, that whether we sustain what would be a satisfactory burden on the appeal on the merits or not, if we believe we have an appeal from this order as of right, under the Baltimore &

Ohio case the money should be held intact until the appeal is disposed of. In saying that we really sustain all of the burden we should have to sustain at this hearing.

MR. COOKE. If your Honor please, I have one suggestion. It seems to me this entire argument ought to be made in Congress. It is right in the face of the statute, and it is an argument as to the injustice of the statute.

MR. JUSTICE BUTLER. I consent to that, that you can make it to Congress if you want to.

It is not for me to decide these questions, and it is not for me to say whether, if I were deciding as the court below did, I would be of their opinion. I am going to refer this application to the Court. I am going to maintain the status quo until the Court acts upon the application. I am going to condition that order that the appeal be immediately perfected and the papers filed, and that all this be presented to the Court on the question of the stay of the order for distribution, that it be submitted in the form of briefs by either side filed before the 15th of September. You may agree upon the order.

(Thereupon, after informal discussion, the hearing was adjourned, at 1 o'clock and 30 minutes p.m.)